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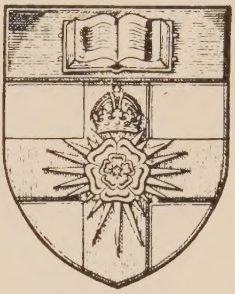

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THE IRISH REPORTS.

1915 —Vol. I.

IRISH REPORTS 1894-

REPRINT 1976

Printed and Published
in Great Britain by
Professional Books Limited,
of Milton Trading Estate,
Milton, Abingdon, Oxon.

PROFESSIONAL BOOKS LIMITED

THE IRISH REPORTS

PUBLISHED UNDER

THE CONTROL OF THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND.

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

J. G. THOMPSON,

BARRISTER-AT-LAW.

1915.

VOL. I.

CHANCERY DIVISION AND LAND COMMISSION.

DUBLIN:

PUBLISHED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND

BY E. PONSONBY, LTD.,

116. GRAFTON STREET.

1915.

BIBL. LONDIN. UNIV.

DUBLIN:

PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND

At the University Press,

BY PONSONBY AND GIBBS.

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The Right Hon. Hugh Holmes.
The Right Hon. John F. Moriarty.
The Right Hon. Stephen Ronan.
The Right Hon. Thomas Francis Molony.

Chancery Division.

The Right Hon. Charles A. O'Connor, M.R.
The Hon. Dunbar Plunket Barton.

Land Judge.

The Right Hon. John Ross.

Irish Land Commission: Judicial Commissioners.

The Right Hon. J. O. Wylie.
The Hon. Gerald FitzGerald.

Attorneys-General.

The Right Hon. Jonathan Pim.
The Right Hon. John Gordon.

Solicitor-General.

James O'Connor, K.C.

[These Reports will be cited as follows :—[1915] 1 I. R.]

REPORTERS.

Court of Appeal, . .	R. St. J. Chadwick, James Moles, J G. Thompson.	Barristers-at-law.
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Mr. Justice Barton, .	R. W. Lucas, E. C. Farran, D. M. Steen,	Barristers-at-law.
Land Judge, ...	D. M. Steen, T. C. Tobias,	Barristers-at-law.
Land Commission, .	John Edwd. Walsh,	Barrister-at-law.

CORRIGENDA.

Page 103, foot-note, insert "3" before "De G. J. & S."
,, 213, line 4 of head-note, *for* "my lands" *read* "my property".
,, 248, ,, 2, for "*Aleton*" read "*Alston*".
,, 371, ,, 10 from end, for "*Howatt*" read "*Mowatt*".
,, 407, ,, 20, delete "and unmarried".

MEMORANDA.

On the 5th February, 1915, STEPHEN RONAN, ESQ., K.C., was appointed a Judge of His Majesty's Court of Appeal in Ireland, in the room of the RIGHT HON. LORD JUSTICE HOLMES, resigned.

On the 2nd May, 1915, the RIGHT HON. LORD JUSTICE MORIARTY died.

On the 1st June, 1915, the RIGHT HON. THOMAS FRANCIS MOLONY was appointed a Judge of His Majesty's Court of Appeal in Ireland.

On the 17th June, 1915, the RIGHT HON. JONATHAN PIM, His Majesty's Attorney-General for Ireland, was appointed a Judge of the King's Bench Division of the High Court of Justice in Ireland; and

JOHN GORDON, ESQ., K.C., was appointed His Majesty's Attorney-General for Ireland.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Alexander *v.* Curragh, 273
Anderson, M'Dermott *v.* *In re* Orr, 191

B.

Best *v.* Best, *In re*, 58
Birr (No. 1) Rural District Council *v.* Birr Urban District Council, 413
Birr Urban District Council, Birr (No. 1) Rural District Council, *v.* 413
Boyd, Gregg *v.* 277
Brown, Woods *v.* 29
Buchanan, *In re*; Stephens *v.* Draper, 95, 99
Burkitt, *In re*; Hancock *v.* Studdert, 205

C.

Carroll's Estate, *In re*, 27
Carson, *In re*; Carson *v.* Carson, 321
Clanricarde's (Marquis of) Estate, *In re*, 422
Cockburn *v.* Newbridge Sanitary Steam Laundry Co., Ltd., 237, 249
Cootehill (No. 2) Rural District Council, Marron *v.* 217
Cox *v.* Dublin City Distillery (No. 2) 345, 358
Crean, James L., Murphy & Co., Ltd. *v.* 111, 130
Cross's Trusts, *In re*; Cross *v.* Cross, 304
Crothers' Trusts, *In re*, 53
Cunninghams, Infants, *In re*, 380
Curragh, Alexander *v.* 273

D.

Donaldson, *In re*; Watson *v.* Donaldson, 63, 70
Draper, Stephens *v.* 95, 99
Dublin City Distillery, Cox *v.* (No. 2) 345, 358

F.

Fitzgerald, D. & T., *In re*, 185
Foot, Hazlewood *v.*; *In re*, M'Cormick, 315
Franks' Estate, *In re*, 387, 395

G

Gabbett, Heard *v.* 213
Gray *v.* Gray, 261
Gregg *v.* Boyd, 277
Greenwood *v.* Lutman, 266
Gun, *In re*; Sheehy *v.* Nugent, 42

H.

PAGE

Hancock *v.* Studdert; *In re* Burkitt, 205
Hazlette, *In re*, 285
Hazlewood *v.* Foot; *In re* M'Cormick, 315
Heard *v.* Gabbett, 213
Holien *v.* Tipping, 210
Hooney, Woodhouse *v.* 296

I.

Inchiquin's (Lord) Estate, *In re*, 169
Irish Insurance Commissioners, Tipperary County Council *v.* 79

K.

Kane *v.* M'Ardle, 259

L.

Lutman, Greenwood *v.* 266

M.

M'Ardle *v.* Kane, 259
M'Carten, M'Kenna *v.* 282
M'Cormick, *In re*; Hazlewood *v.* Foot, 315
M'Dermott *v.* Anderson; *In re* Orr, 191
M'Grorty *v.* O'Neill 1
M'Kenna *v.* M'Carten, 282
Mahony *v.* Treacy; *In re* Richardson, 39
Marron *v.* Cootehill (No. 2) Rural District Council, 217
Murphy (James L. & Co.) *v.* Crean, 111, 130

PAGE

N.

Newbridge Sanitary Steam Laundry Company, Ltd., Cockburn *v.* 237, 249
Nugent, Sheehy *v.*; *In re* Gun, 42

O.

O'Neill *v.* M'Grorty, 1
Orr, *In re*; M'Dermott *v.* Anderson, 191

P.

Pinkerton *v.* Pratt, 406
Pratt, Pinkerton *v.* 406

R.

Richardson, *In re*; Mahony *v.* Treacy, 39

S.

Sheehy *v.* Nugent; *In re* Gun, 42
Solicitor, *In re* A, 152
Steele *v.* Steele (No. 2), 20
Stephens *v.* Draper, 95, 99
Studdert, Hancock *v.*; *In re* Burkitt, 205

T.

Tipperary County Council *v.* Irish Insurance Commissioners, 79

PAGE
Tipping, Holien *v.* 210
Toppin's Estate, *In re*, 198, 330
Treacy, Mahony *v.*; *In re* Richardson, 39

W.

PAGE
Watson *v.* Donaldson; *In re* Donaldson 63, 70
Woodhouse *v.* Hooney, 296
Woods *v.* Brown, 29

TABLE OF CASES CITED.

A.

PAGE

Aberdeen Railway Co. *v.* Blaikie Brothers, ... 359
Alexander *v.* Automatic Telephone Co., . . . 240, 250
Allinson *v.* General Council of Medical Education and Registration, . . 158, 159, 163
Alsbury, *In re*; Sugden *v.* Alsbury, ... 324
Alsop *v.* Lord Oxford, . . 62
Amos *v.* Chadwick, . 361, 378
Appleyard *v.* New London and Suburban Omnibus Co., . 362
Archibald *v.* Wright, . 206, 208
Armitage, *In re*, . . . 324
Ashbrook's Estate, *In re*, . 23
Ashbury Railway Carriage and Iron Co. *v.* Riche, . . 254
Athlone Rifle Range, *In re*, . 424
Attorney-General *v.* Doyley, . 51
——— *v.* London County Council, . . 89
——— *v.* Tomline, 212
Atwool *v.* Merryweather, . 251
Avery *v.* Langford, . . 119

B.

Baillie & Co., *In re*, . . 60
Baker *v.* Baker, 100, 101, 106, 107
Bampfield *v.* Popham, . . 263
Bandon's Estate, *In re*, . . 23
Barker, *In re*; Buxton *v.* Campbell, ... 288
Bartlett *v.* Charles, . . . 7, 14
Barton's Trust, *In re*, . . 324
Barton to Irvine, . . 188, 189
Batey, *In re*, ... 40
Bayly's Estate, *In re*, . 201, 331
Bedson's Trusts, *In re*, . . 263

PAGE

Begbie *v.* Phosphate Sewage Co., 120
Bell *v.* Bell, . . . 100, 101
Bennett's Estate, *In re*, 307, 310, 313
Bennett *v.* Lord Bury, . 361, 378
Benson *v.* Heathorn, . . 241
Bentley, *In re*; Podmore *v.* Smith, ... 66, 70
Bethlehem Hospital, *In re*, . 178
Bigge, *In re*, . . . 100, 101
Birch *v.* Sherratt, . 101, 104, 105
Blakemore, *In re*, . . . 40
Blennerhassett's Estate, *In re*, 288
Bodega Company, Limited, *In re* 241
Boehm *v.* Goodall, . . . 11, 17
Boston Deep Sea Fishing and Ice Co. *v.* Ansell, . . 241
Boswell *v.* Coates, . . . 274
Bouch *v.* Sproule, . 324, 327, 328
Bowden, *In re*, ... 100
Boyle *v.* Boyle, . 193, 194, 195
Bradley *v.* Westcott, . 207, 208
Brander *v.* Brander, . . 328
Brennan *v.* Dorney, . . 131
Bridge, *In re*; Franks *v.* Worth, 32
Briscoe & Smith, *In re*, . . 188
British America Corporation, Limited, *In re*, . . . 240
British Traction and Lighting Company, Limited, *In re*, . 12
Brown *v.* Harrison, . 193, 194, 195
Browne *v.* Warnock, 201, 203, 333, 341
Brydges *v.* Brydges, . . 397
Burdekin, *In re*, . 188, 189, 190
Burland *v.* Earle, 240, 241, 242, 247, 250, 251, 253
Burt, Boulton, and Hayward *v.* Bull, ... 17
Bury's Estate, *In re*, . 201, 331
Buxton *v.* Campbell, *In re* Barker, ... 288
Byng *v.* Byng, . . . 263

C.

PAGE

Cameron, *In re*, . . . 9
Campbell *v.* Australian Mutual Provident Society, . 241, 242
Cardiff (Mayor of) *v.* Cardiff Waterworks Co., ... 418
Carlyon, *In re*, . . . 32
Carr *v.* Ingleby, . . . 40, 41
Carroll's Estate, *In re*, . . 215
Carter *v.* Salt, . 100, 101, 106
Chamberlaine *v.* Chester and Birkenhead Railway Co., 417, 420
Chaplin *v.* Chaplin, 396, 397, 400, 401, 402, 403, 408, 409, 410
Civil Service Musical Instrument Association, Limited, *v.* Whiteman, . . . 417
Clark, *In re*; Clark *v.* Randall 55
Clark *v.* Clemmans, . . 67, 68
Cloutte *v.* Storey, . . . 7
Condon *v.* Mitchelstown Rural District Council, . 221, 230, 235
Coleborne *v.* Kearns, . . 131
Collins *v.* Blantern, . . 134
Compton *v.* Ovenden, . . 201
Consolidated South Rand Mines Deep, Limited, *In re*, . . 241
Cook *v.* Frederick, *In re* Nash, 318, 319
County of Gloucester Bank *v.* Rudry Merthyr Colliery Co., 354, 359, 363, 379
Cranwell *v.* London (Mayor of), 425
Craven *v.* Brady, . . . 55
Cresswell *v.* Cheslyn, 66, 71, 72, 74, 76
Crosbie's Estate, *In re*, . . 23
Cunningham *v.* Foot, . 288, 293
Cutbush *v.* Cutbush, . . 9, 10

D.

Davis (Jane), *In re*; Evans *v.* Moore, ... 288
Deakin, *In re*; Stanley *v.* Eyres, 44, 46, 48
Dearberg *v.* Letchford, . . 307
De Bussche *v.* Alt, . . 122
De Hoghton *v.* De Hoghton, 270, 272
Devitt *v.* Kearney, . . 10
Dickenson *v.* Teasdale, . . 288
Dodd *v.* Churton, . . . 117
Doe *v.* Groves, . . 301, 303
—— *v.* Scarborough (Earl of), 411
—— d. Herbert *v.* Thomas, . 284
—— *v.* Wood, . . . 301
Doherty *v.* Kennedy, 353, 355, 356, 357, 360, 361, 362, 363, 366, 368, 372, 373, 374, 377

PAGE

Dolphin *v.* Aylward, . . 270
Dominion Cotton Mills Co. *v.* Amyot, . . . 251, 253
Donisthorpe *v.* Porter, 200, 332, 333, 337, 339
Dowse *v.* Gorton, . . 8, 13, 16
Drew *v.* Barry, 396, 397, 404, 408, 411
Dublin City Distillery, Limited *v.* Doherty, 353, 355, 356, 357, 360 361, 362, 363, 366, 368, 372 373, 374, 377
Dunlop *v.* Greer; *In re* Patton, 44, 46, 51

E.

Eavestaff *v.* Austin, . . 55
Edgar *v.* Plomley, . . . 7, 15
Edmonds, *Ex parte*, . . 9
Ely's Estate, . . . 215
Erin Insurance and Investment Co., Limited, *In re*, . . 363
Evans *v.* Moore; *In re* Jane Davis, ... 288
Evered *v.* Leigh; *In re* Oliver's Settlement, 307, 312, 313, 318, 319, 397
Eyton, *In re*, ... 7, 14

F.

Farman *v.* Mills, . . . 101
Featherstone's Trusts, *In re*, . 67
Ferguson *v.* Wilson, . . 250
Ferguson & Co., to Buckley, *Ex parte*, ... 60
Fermoy's Estate, *In re*, . . 201
Finch *v.* Hollingsworth, . . 47
Finlason *v.* Tatlock, . . 265
Forbes *v.* Moffatt, 200, 331, 333, 338
Foss *v.* Harbottle, 242, 243, 244, 246, 248, 249, 251, 253
Foster *v.* Smith, . . 100, 101
Four Solicitors, *In re*, . . 158
Franks's Estate, *In re*, 408, 409, 410
Franks *v.* Worth; *In re* Bridge, 32
Frazer *v.* Murdock, . . 10
Fry *v.* Caffer, . . . 318
Fullwood *v.* Fullwood, . . 126

G.

Garland, *Ex parte*, . 8, 9, 10, 13
Gaslight Improvement Co. *v.* Terrell, ... 359

PAGE

Gedge *v.* Royal Exchange Assurance Corporation, . . 134
Gibson *v.* Doig. . . . 118
Giles, *In re*; Real and Personal Advance Co. *v.* Michell, . 32
Gillespie *v.* Alexander, . . 7, 14
Gompertz *v.* Gompertz, . . 283
Grant's Estate, *In re*, . . 215
Grant *v.* Littledale; *In re* Thursby's Settlement, 307, 312
—— *v.* Lynam, . . 45, 46, 47
Gratrix *v.* Chambers, . . 40, 41
Gravely *v.* Barnard, . . 120
Greig *v.* Somerville, . . 7, 8
Greville's Settlement, *In re*, . 187
Greymouth Point Elizabeth Railway and Coal Co., *In re*, 240, 354, 359, 360, 362, 365, 369, 376
Grice *v.* Shaw, . . 335, 343
Grieve *v.* Grieve, . . . 263
Guardian Assurance Co. *v.* Avonmore, ... 270
Guest *v.* Smythe, . . . 33

H.

Haigh *v.* Brooks, . . . 120
Hamond *v.* Walker, . 360, 378
Handcock's Trusts, *In re*, 318, 319
Handcock *v.* Watson, . 194, 197
Harding *v.* Glyn, . . 46, 47, 51
Harris *v.* Davis, . . 70, 72
—— *v.* Newton, . . . 283
—— *v.* O'Loghlen, 278, 279, 281
Haynes *v.* Haynes, . . . 201
Hepworth *v.* Pickles, . 118, 122
Hickley and Stewart, *In re*, . 187
Hill, *In re*, . . . 158, 159
Hillas's Estate, *In re*, . . 215
Hinde *v.* Gray, . . . 131
Hinkson *v.* Price's Patent Candle Co., ... 82, 87
Hitchcock *v.* Coker, . . 130, 133
Hocking, *In re*; Michell *v.* Loe, 201, 203, 331, 333, 341
Hodge *v.* Churchyard, . . 288
Hodgens, *In re*, . . 324, 328
Hogg *v.* Scott, . . . 126
Holliday *v.* Overton, . . 311
Hooker *v.* Hooker, . . . 200
Hopkins' Trusts, *In re*, . . 324
Hopkins *v.* Prescott, . . 119
Hornby, *In re*, . . . 65, 67
Horton *v.* Smith, . . 200, 334
Houston, *In re*; Rogers *v.* Houston, . . . 308, 313
Houston *v.* Platt, . . . 263

PAGE

Howard, *In re*; Taylor *v.* Howard, ... 194
Howarth, *In re*; Howarth *v.* Mackinson, . . 100, 101, 105
Hoy *v.* Master, . . 207, 208
Hughes *v.* Kelly, . . . 288
Hulse *v.* Hulse, . . . 131
Hunter, *In re*, . . . 84
Hurst *v.* Picture Theatres, Ltd. 260
Hutchins' Estate, *In re*, . . 397

I.

Inchiquin's (Lord) Estate, *In re*, 171, 172, 178
Ingle *v.* Vaughan Jenkins, . 201
Ingleton *v.* Maudsley, . 260, 261
Irving *v.* Houstoun, . 324, 328
Irwin, *In re*; Irwin *v.* Parkes, 308
Islington Vestry *v.* Hornsey Urban Council, . . 417, 421

J.

Jackson's Will, *In re*, . . 45
Jackson and Bassford, Limited, *In re*, ... 363
Jamieson *v.* Trevelyan, 270, 271, 272
Jarman *v.* Hale, . . . 301
Jee *v.* Audley, . . . 331
Jenings *v.* Baily, . . 194, 196
Jervoise, *In re*, . . 6, 7, 14
Johnson, *In re* (68 L.T. 20), 55, 57
Johnson, *In re*; Shearman *v.* Robinson, . . . 9, 12, 13
Jones *v.* Barnett, . . . 33
—— *v.* Morgan, . . . 334
Jull *v.* Jacobs, . . . 55

K.

Kaye *v.* Dutton, . . 118, 120
Kelly, *In re*, ... 98
Kelly *v.* Montague, . . 135, 142
Kelsey *v.* Dodd, . . 118, 132
Kennedy *v.* De Trafford, . . 33
Keogh *v.* Keogh, . . . 334
King *v.* King, . . . 318, 319
Kingsbury *v.* Walters, . . 68
Kirkpatrick *v.* King, 262, 264, 265
Kirkwood *v.* Hamilton, . . 6
Knight *v.* Ellis, . . . 263
Knox, *In re*; Snodgrass *v.* Gamble, . . . 194, 195

L.

PAGE

Lacey & Son, *In re*, . 60, 62, 187
Lacy, *In re*; Royal General Theatrical Fund Association *v.* Kydd, ... 289
Lainson *v.* Lainson, ... 55
Lambert *v.* Thwaites, . 45, 46, 49
Lassence *v.* Tierney, 194, 198, 283
Lawlor *v.* Henderson, . . 46, 48
Leconfield's (Lord) Estate, *In re*, ... 178
Lemon *v.* Mark, 200, 203, 332, 334
Lethieullier *v.* Tracy, . . 263
Lidwell *v.* Lidwell, . 274, 275
Liefe *v.* Saltingstone, . . 208
Limerick (Earl of), Owner: Turner, Petitioner, . . 278
Lindsell *v.* Phillips; *In re* Powers, ... 32
Liquidation Estates Purchase Co. *v.* Willoughby, . 331
Liverpool (Mayor of) *v.* Chorley Waterworks Co., . . 418, 419
Longworth *v.* Campbell, . . 263
Lord *v.* Copper Miners Co., . 246
Lound *v.* Grimwade, . . . 131
Lovatt *v.* Williamson; *In re* Whiston's Settlement, 307, 310, 312, 314
Love, *In re*, ... 55
Lowman, *In re*, . . 333, 341
Lucas *v.* Brandreth, . 307, 311

M.

MacDougall *v.* Gardiner, 244, 246, 248, 250, 251
McEntaggart *v.* Byrne, . . 119
McKay *v.* McKay, 64, 65, 66, 75
McNeillie *v.* Acton, . . 9, 10
Maddever, *In re*, . . . 417
Magan, *In re*, . . 332, 335
Malam, *In re*; Malam *v.* Hitchens, ... 324
Manchester's (Duke of) Settlement, *In re*, . . . 271
Marshall's Settlement, . 334, 344
Maskelyne *v.* Maskelyne, . 208
Mason, *In re*; Mason *v.* Robinson, ... 101, 106
Maxim-Nordenfelt Gun Co. *v.* Nordenfelt Co. . . 117, 130
Maxwell's Will, *In re*, . . 208
Menier *v.* Hooper's Telegraph Works, . . . 240, 248
Mercer *v.* Liverpool Railway Co., 424
Meyler *v.* Meyler, 307, 308, 310, 313

PAGE

Michell *v.* Loe; *In re* Hocking, 201, 203, 331, 333, 341
Middleton *v.* Wallis, . 118, 122
Milbank *v.* Vane, . 408, 411
Mitchel *v.* Reynolds, . . 130
Moore *v.* McGlynn, . . 6, 12
Morris, *In re*; Morris *v.* Latchford, ... 10
Mountfort, *Ex parte*, . . 384
Mowatt *v.* Castle Steel and Iron Works Co., . . 359, 371
Mozley *v.* Alston, . . 246, 248

N.

Nannock *v.* Horton, 207, 208, 209
Nash, *In re*; Cook *v.* Frederick, 318, 319
Nixon *v.* Smith, *In re* Timmis, . 289
Nordenfeld *v.* Maxim Nordenfelt Guns and Ammunition Co., 117, 130
Normandy *v.* Ind, Coope & Co., 251
North-Western Salt Co., Ltd., *v.* Electrolytic Alkali Co., Ltd., ... 134, 140
Nowlan *v.* Walsh, . . . 206

O.

O'Ferrall's Estate, *In re*, 22, 25
Oliver's Settlement, *In re*; Evered *v.* Leigh, 307, 312, 313 318, 319, 397
Orford *v.* Orford, . . 70, 71, 75

P

Paris *v.* Paris, . . . 324
Parker, *In re*, . . . 283
Parker *v.* Baylis, . . 119
——— *v.* Blenkhorn, . . 61, 187
Patton, *In re*; Dunlop *v.* Greer, 44, 46, 51
Pavitt, *In re*, . . 381, 385
Pender *v.* Lushington, . . 251
Penny *v.* Penny . . . 424
Persse *v.* Mitchell, . . 333, 342
Phillips *v.* Gutteridge, 101, 103, 104, 105, 107, 108, 109, 110
——— *v.* London School Board, 82, 87
Piercy, *In re*, . . . 324
Piggott *v.* Jefferson, . . 288
Podmore *v.* Smith; *In re* Bentley 66, 70
Pope *v.* Whitcombe, . 46, 48, 51

PAGE
Porter's Settlement, *In re*, . 270
Power's Estate, *In re*, . . 215
Powers, *In re*; Lindsell *v.* Phillips, ... 32
Preston *v.* Melville, . . 324
Procter *v.* Bennis, . . 122
Pudsey Coal Gas Co. *v.* Corporation of Bradford, . 418, 419
Pugh *v.* Drew, . . 308, 312

R.

R. *v.* Bowman, ... 124
— (Murphy) *v.* Cork (Justices of), ... 131, 135
— (Drury) *v.* Dublin Corporation and Henry Campbell, . 83
— (Bourke) *v.* Dublin (Justices of), 117, 119, 120, 123, 131, 133
— (Moriarty) *v.* Dublin (Justices of), 117, 119, 120, 123, 131, 133
— (Clitheroe) *v.* Dublin (Recorder of), . . 133, 141, 142
— (Peacocke) *v.* Dublin (Recorder of), . . 117, 131, 133
— (Hinds) *v.* Estates Commissioners, ... 424
— *v.* Gyngall, . . 382, 383
— *v.* Newell, ... 84
— (and Allen) *v.* Newton . 133
— (Cork County Council) *v.* Sheehan, ... 86
— *v.* Westmoreland County Court Judge, . . 260, 261
Ramsay *v.* Shelmerdine, . 70, 74
Rathdrum Rural District Council *v.* Saul, . . . 417
Raybould, *In re*, . . . 13
Read, *In re*, ... 61
Read *v.* Anderson, . . . 120
Real and Personal Advance Co. *v.* Michell, ... 32
Reid *v.* Carleton, . . 206, 208
Richards, *In re*, . . . 283
Richards *v.* Revitt, . . . 122
——— *v.* Richards, . 201, 331
Richardson, *Ex parte*, . . 9, 10
Rishton *v.* Cobb, . . . 194
Ritchie *v.* Smith, . . 132, 146
Rochdale Canal Co. *v.* King, . 417
Roddy *v.* Fitzgerald, . . 405
Rogers *v.* Houston, *In re* Houston, . . . 308, 313
Romain, *In re*, . . . 60, 187
Royal General Theatrical Fund Association *v.* Kydd, . . 289
Russell *v.* Wakefield Waterworks Co., ... 249
Ryan, *In re*, ... 279

S.

St. Sepulchre's (Vicar of), *Ex parte*, ... 177
Salvin *v.* Weston, . 100, 101, 107
Sanders' Settlement, *In re*, . 188
Sanders *v.* Ashford, . . 67, 68
Savill Brothers *v.* Langman, . 133
Sayers *v.* Collyer, . . . 132
Scawin *v.* Watson, . . . 283
Scott *v.* Brown, Doering, M'Nab, & Co., ... 134
Sharp *v.* Dawes, . . . 240
Shaw *v.* M'Mahon, . . . 66, 72
Shearman *v.* Robinson; *In re* Johnson, . . . 9, 12, 13
Shelton's Estate, *In re*, . . 215
Sheridan *v.* O'Reilly, . . 263
Shrewsbury *v.* Shrewsbury, . 334
Shroeder *v.* Clough, . . 274
Shrymsher *v.* Northcote, . . 70, 74
Sinclair, *In re*, . . . 40
Slattery *v.* Ball, . . . 263
Smith *v.* Farnaby, . . 396
Snodgrass *v.* Gamble; *In re* Knox, . . . 194, 195
Solicitor, *In re* A, ([1912] 1 K.B. 302) 158, 159, 163, 164
Spiller, *In re*; Spiller *v.* Madge, 65, 67
Spiral Globe, Limited (No. 2), *In re*, ... 362
Stanley *v.* Eyres; *In re* Deakin, 44, 46, 48
Star Steam Laundry Co. *v.* Dukas, ... 241
Starkie, *Ex parte*, . . . 384
Steele *v.* Steele, . . 21, 22, 24
Stelfox *v.* Sugden, 100, 101, 106, 107
Stewart, *In re*, 186, 188, 189, 190
Stinson's Estate, *In re*, 308, 313, 397
Stockport District Waterworks Co. *v.* Mayor, etc., of Manchester, . . . 418, 419
Stott *v.* Milne, . . . 12
Strickland *v.* Symons, . . 10
Stringer's Estate, *In re*, . . 207
Sugden *v.* Alsbury, . . 324
Summerson, *In re*, . . . 122
Swinfen *v.* Swinfen, 334, 335, 342, 344
Sykes *v.* Sykes, . . . 66, 74
Symers *v.* Jobson, . . . 265

T.

	PAGE
Tatham *v.* Vernon,	311
Taylor *v.* Howard; *In re* Howard,	194
——— *v.* Roe,	274, 275
Tennent *v.* Neill,	118
Tevlin *v.* Lisnaskea Rural District Council,	226
Thomas *v.* Sorrel,	119, 133
Thompson *v.* Andrews,	9
Thomson's Estate, *In re*,	207
Thornhill *v.* Nixon,	333, 340
Three Towns Banking Co. *v.* Maddever,	417
Thursby's Settlement, *In re*; Grant *v.* Littledale,	307, 312
Timmis, *In re*; Nixon *v.* Smith,	289
Tomlinson *v.* Dighton,	208
Tootal's Estate, *In re*,	101
Towers *v.* African Tug Co.,	250
Tredwell, *In re*,	55
Tremayne *v.* Rashleigh,	215
Tringham's Trusts, *In re*,	307, 308, 310, 313, 397
Trowell *v.* Shenton,	270
Tyson *v.* Jackson,	289

W.

	PAGE
Watkin's Settlement, *In re*,	101
Weale *v.* Ollive,	194
Weare, *In re*,	158, 159
Webb *v.* Spicer,	120, 134
Weeding *v.* Weeding,	23
Weeks *v.* Peach,	397
West's Estate, *In re*,	98
Whiston's Settlement, *In re*; Lovatt *v.* Williamson,	307, 310, 312, 314
Whitby *v.* Mitchell,	318
White, *In re*,	333, 341
Whitehorne, *In re*; Whitehorne *v.* Best,	55, 56
Whitmore *v.* O'Reilly,	176
Wigsell *v.* Wigsell,	334
Wilkinson, *Ex parte*,	109
Williams, *In re*,	283
Williamson *v.* Farwell,	318
Willoughby, *In re*,	382
Wilmott *v.* Barber,	134, 417
Wilson *v.* Duguid,	44, 45, 48, 50
Wormald *v.* Muzeen,	100, 101, 107
Wright *v.* Horton,	362
Wroughton *v.* Colquhoun,	40, 41
Wykham *v.* Wykham,	397
Wyndham *v.* Egremont,	201, 203, 332, 338

Y.

Yuill *v.* Greymouth Point Elizabeth Railway and Coal Colliery Co.,	240, 354, 359, 360, 362, 365, 369, 376
Young, *In re*,	100
Young *v.* Naval, Military, and Civil Service Co-operative Society for South Africa,	360, 363

CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1915.

O'NEILL *v.* McGRORTY.

M. R.
1914.
March 25,
26, 27.
May 6.

(1905. No. 375.)

Administration—Executor—Assets of Testator—Power of Executor to carry on Business—Right of Manager appointed by the Court to Indemnity out of General Assets—Right of Trade Creditors to Payment out of General Assets—Subrogation—Effect of carrying Fund to Separate Credit.

A manager appointed by the Court in an administration action to carry on the business of a testator in the place of the executor, who had an implied power to carry it on, no particular assets being devoted by the will for that purpose, is entitled to be indemnified by the general assets against liabilities incurred by him in carrying on the business, and the trade creditors are consequently entitled to resort to such assets for payment of their debts. The fact that funds have been carried to the separate credits of legatees does not free such funds from liability in this respect.

The effect of carrying funds to a separate credit considered.

M. R. 1914.

O'NEILL v. McGRORTY.

ADJOURNED SUMMONS.

The following statement of the facts is taken from the judgment of the Master of the Rolls:—

"This action is one for the administration of the estate of William McGrorty, who carried on a general business in Killygordon in the county of Donegal. He made his will on the 10th March, 1893. By it he appointed the Rev. Vincent Grogan, the Rev. Dominick T. O'Neill, and Alexander McGrorty, his executors. He devised and bequeathed to his executors, whom he also appointed his trustees, all his real and personal property, including fee-simple property, farms held under judicial tenancies, moneys invested in the British funds, money in bank, his business premises, business, stock-in-trade, and book accounts due to him, upon trust to pay a certain annuity of £100, and, as to seven sums of £2000 each, to pay to each of the seven daughters of his niece, Catherine McGrorty, the interest on the said sum of £2000, arising from the investment of each such sum for life, and, after the death of each such daughter, to pay the principal to her children, as she should appoint, and, as to all the rest, residue, and remainder of his property, the testator directed it to be held upon trust, subject to the annuity and legacies, for his nephew, Alexander McGrorty, who was the father of the legatees. The testator further directed his executors to sell his interests in certain farms, and to withdraw the sum of £5000 out of his business in instalments of £1000 yearly, or in such larger instalments as they might consider his business could afford, and to invest the proceeds and the said sum of £5000 in consols, and to retain the same as security with his other property for payment of the annuity and legacies.

"The testator made two codicils to his will. The first does not require notice, because it only gives a few pecuniary legacies. The second is dated the 22nd July, 1898. It recites that since the execution of the will and first codicil, his nephew, Alexander McGrorty, had had born to him a son, John McGrorty, and two more daughters, and that the testator was desirous of making provision for them. He revoked the devise of his real estate, and he devised and bequeathed all his lands, tenements, and heredita-

ments, and all his freehold and chattel real estate to the trustees named in his will, and two others, viz. the Rev. Gregory John Callaghan and Thomas J. Callaghan, whom he constituted executors and trustees, in trust as to the real estate, to hold the same for Alexander McGrorty during his life, or till his bankruptcy, and subject thereto for John McGrorty on his attaining the age of twenty-five years. The testator further, by this codicil, gave to each of the two daughters who were born to the said Alexander McGrorty since the date of the will a sum of £2000.

"The testator died on the 3rd December, 1900, and his will and two codicils were proved by the Rev. Dominick Thomas O'Neill and Alexander M'Grorty.

"I may mention here that in the course of the action it was decided that the testator's chattel real property passed under the second codicil, and was held on the trusts thereof, and that the legacies were payable out of the pure personal estate. This consisted of moneys in the funds, moneys in bank, the business, the stock-in-trade, and debts due to the business, a mixed fund, of which the business assets formed a part.

"After the testator's death the business was carried on by Alexander McGrorty until his death, which occurred on the 23rd February, 1904. The business was subsequently carried on by the survivor of the executors who had proved, viz. the Rev. Dominick T. O'Neill, until the commencement of the action.

The necessity for the action arose from breaches of trust committed by Alexander McGrorty. This gentleman appears to have had no great respect for the testator's regard for consols as a sound investment. He withdrew large sums from the business, but instead of investing them in consols, as directed by the will, in the joint names of himself and his co-executor, he invested them in his sole name, or in his own name and that of his wife, principally in South African mines, with the usual disastrous result. The shares depreciated, and the fund which ought to have been available for payment of the legacies was considerably below what was required. In these circumstances the action was instituted by the surviving executor, and a decree for administration was made on the 13th July, 1905; and by the decree Edward McMenamin, who had been for many years in the employ-

M. R. 1914.

O'Neill v. McGrorty.

ment of the testator and Alexander McGrorty, was appointed the manager of the business, which was to be carried on under the authority of the Court, it being assumed, as indeed all parties now admit, that the will authorized the continuance of the trading. It is quite clear that the Court sanctioned the continuance of the business and appointed the manager, principally in the interest of the unpaid legatees, that is the children of Alexander McGrorty, who were entitled to legacies of £2000 each, which had not been paid or provided for. These legacies were a charge upon the business and the other personal estate.

"On the 15th March, 1907, the action came on for further consideration. The business was still being carried on, and, as part of the personal estate, was liable to make good the legacies; but no order was made for a sale thereof, it being thought that it was advisable to postpone the sale. By the decree on further consideration it was declared that the legacies bequeathed to Alexander McGrorty's children were due and payable, and that the legatees were entitled to interest thereon from the testator's death.

"By a subsequent order dated the 2nd July, 1907, there being then a considerable sum of consols in Court representing personal estate, it was ordered that there should be carried over to the separate credit of each of the several legacies of £2,000 a sum of consols equivalent to £1,200 cash, and it was further ordered that the dividends on three of the said sums which were so to be carried over should be paid to three of the legatees who had come of age.

"The circumstances and purposes for which this order was made were set forth in the affidavit of the Rev. Dominick T. O'Neill, the plaintiff. So long as the legacies remained unpaid they carried interest at 4 per cent., which the business was liable for. This was represented to be too heavy a burden for the business, and the proposition was made that the funds in Court should be applied in part satisfaction of the legacies by carrying sums on account to the separate credits opened in pursuance of the order. The sums brought to separate credits were therefore intended to operate as payments in point of law to the same extent as if payments were made out of Court. The claims of the legatees against the general personal estate were thus reduced

pro tanto. It must be considered later on how far this affects the question submitted to the Court.

"The next event which requires mention is the removal of Edward McMenamin from the management of the business under the Court, and the appointment of a Mr. Fitzpatrick as receiver and manager in his stead, by an order dated the 25th October, 1910. By a later order dated the 19th June, 1911, the business was ordered to be sold; but before that order was carried out a disaster occurred. The business premises and stock-in-trade were burned on the 21st August, 1911, and the assets, which were regarded as sufficient security for the payment of the business liabilities, disappeared. These liabilities were incurred during the management of the late manager, who was acting under an order of the Court. He is personally responsible for them, with any right of indemnity which exists in his favour. The creditors are entitled to the benefit of this indemnity, whatever it may be, because it is their right to be subrogated to the right of the manager. In consequence of the destruction of the business premises, the only funds which remain under the control of the Court (with the exception of a small sum standing to the general credit of the action) are the funds which have been carried to separate credits under the order of the 2nd July, 1907. It is to determine whether these funds are available for the indemnity of the manager, and through him for the payment of the trade creditors of the business, that the matter is now before the Court.

"The question has been formally raised by a summons issued on behalf of the trade creditors, asking for an order that, notwithstanding the order dated the 2nd July, 1907, directing nine sums of £1,200 each to be transferred to the separate credits of the legacies, all the trade creditors be declared entitled to be paid the amounts of their respective debts out of the assets of the testator, and, in so far as the other assets may prove deficient, that the said debts be paid out of the said sums transferred to separate credits."

S. L. Brown, K.C. (with him *Babington*), in support of the summons:—

It is admitted that the will gave an implied authority to

M. R. 1914.

O'NEILL v. McGRORTY.

the executors to carry on the business. The order of the Court appointing a receiver and manager was made on consent, and was an order to carry on the business for the benefit of all parties, including the legatees. There was not enough money to make up their legacies to £2,000 each. The plaintiff obtained the order transferring the sums of consols to separate credits because the legacies bore interest at 4 per cent.; there was no intention to place those sums outside the estate. The entire assets are liable to indemnify the executor against debts incurred in the trading, and, if so, are liable under the doctrine of subrogation to the trade debts. The law as to the rights of trade creditors when a business has been carried on by executors and by the leave of the Court was considered by Sir Andrew Porter in *Kirkwood* v. *Hamilton* (1). A business was carried on in that case by a widow under the superintendence of the executors by the leave of the Court, and an order was made for payment of creditors of the widow in priority to creditors of the testator. The will there empowered the executors to allow the widow to carry on the business. The same law would apply to the case of a manager appointed by the Court to carry on a business. In *Moore* v. *McGlynn* (2) Barton J. held in the case of an executor who was authorized to carry on the testator's business by the will and by the Court, that he was entitled to an indemnity in respect of trade debts; that the amount of such indemnity took precedence over the costs awarded to a plaintiff legatee; and that the trade creditors were subrogated to the executor's rights of indemnity and priority. The effect of the order of July, 1907, carrying sums to separate credits, did not release those sums from liability in the event of the business becoming insolvent. The legatees got the benefit of the money taken out of the business and were interested in its being carried on. *In re Jervoise* (3) may be relied on, where Lord Langdale said that when a fund is carried over to a particular separate account it is released from the general question in the cause, and becomes marked as being subject only to the questions arising upon the particular matter referred

(1) 36 I. L. T. R. 155.
(2) [1904] 1 I. R. 334.
(3) 12 B. 209.

to in the heading of the account; but that was only his opinion. The law at the time as to the right of a creditor to be paid out of assets, though carried to a separate credit, was not affected by that case, except where the order had been acted on by third parties who had become purchasers for value, *e.g.*, a mortgagee of a legacy: *Gillespie* v. *Alexander* (1). Lord Eldon there held that a creditor who came in after a fund had been apportioned and part of it paid over, and the remainder of it carried to the account of particular legatees, was entitled to receive a proportion of his debt out of the funds of the legatees remaining in Court. That case was followed by Lord Lyndhurst in *Greig* v. *Somerville* (2). As long as funds are under the control of the Court, the Court can deal with them, except in the case of a purchaser without notice. In *In re Eyton*, *Bartlett* v. *Charles* (3), Chitty J. held that where funds had been carried over to "the account of a perpetual annuity of the defendant and her issue," and she had charged her interest in the fund, and the incumbrancer had got a stop order on it, the incumbrancer had priority over a claim made by the plaintiff for contribution for breach of trust after the order transferring the fund to the separate credit had been made. The order there had been made in the presence of the plaintiff. Chitty J. adopted what Lord Langdale said in *In re Jervoise* (4), but admitted that the money might have been recalled from the separate account if the contention had only been between the defendant and the plaintiff. That case was followed by the Privy Council in *Edgar* v. *Plomley* (5). In *Cloutte* v. *Storey* (6) it was held, affirming Neville J., that a separate account is merely the machinery by which the Court has carried its declaration into effect; and so long as the fund remains in Court, that machinery is under the control of the Court. The cases already mentioned were there discussed.

Herbert Wilson, K.C., for the Hibernian Bank, in the same interest:—

The testator authorized the trading by his will, and the Court sanctioned the carrying on of the business with full knowledge of

(1) 3 Russ. 130.
(2) 1 R. & M. 338.
(3) 45 Ch. D 458.
(4) 12 B. 209.
(5) [1900] A. C. 491.
(6) [1911] 1 Ch. 18.

M. R. 1914. O'NEILL v. MCGRORTY.

the facts. An account was opened and kept with the Hibernian Bank; the over-draft to the bank is mentioned in the account furnished by the manager to the chief clerk. I only refer to one case: *Greig* v. *Somerville* (1).

Arthur Meredith, K.C. (with him *Poole*), for three of the legatees:—

These legatees were wards of Court; one is now of age. As regards the law applicable to the case; there may be—1, an express dedication by a testator of all his assets to carry on the business; that was the case in *Dowse* v. *Gorton* (2). 2, He may expressly or impliedly authorize the trade to be carried on, and dedicate a portion of his assets, other than trade assets, to carry on the business: *Ex parte Garland* (3). In that case the executor's indemnity is limited to the assets devoted to the trading. Or 3, the testator may give his executor power to carry on the trade, without mentioning the assets with which it is to be carried on. In such case the executor has no authority to employ any assets in the business other than the assets employed by the testator at the time of his death. Further, if the testator has, as here, specifically directed his executors to withdraw any sums from the assets employed, and the executor does so, he loses his right of indemnity as to these assets withdrawn, for the testator has directed them to be withdrawn and no longer employed in the business. It is said that there was an implied direction here to carry on the trading with the entire assets. I deny that. The creditors here have no direct claim on the assets; they can only claim by subrogation. Traders who deal with the manager of a business know the circumstances, or are bound to know them. In *Ex parte Garland* (3) Lord Eldon says (p. 119): "If it is to be determined upon the convenience, it is not so inconvenient to say, those who deal with the executor must take notice that the testator's liability is limited by the authority given to the executor, as to say, on the other hand, that the executor being authorized to carry on that trade, making from day to day a great variety of engagements, or, as it has

(1) 1 R. & M. 338.
(2) [1891] A. C. 190.
(3) 10 Ves. 110.

been put, entering into one great and important engagement, but also authorized by the will to do many other acts, which he must equally do in a due administration under the will, wherever for the benefit of one child the trade is directed to be carried on ; all the other objects of the will must at any distance of time be considered, to the extent of the property they take, security for the creditors on the trade." That case decides that the testator's responsibility is limited by the authority given to the executor; the executor's right of indemnity when properly carrying on the trading with the assets authorized by the testator to be employed therein is against such assets and no further, and the creditors who claim through him have no higher right. Lord Selborne's judgment in *In re Cameron* (1) is to the same effect. In *Ex parte Richardson* (2), and in *Thompson* v. *Andrews* (3), the testator authorized his business to be carried on with a certain portion of his property, and it was held that the executor had only a limited power to trade. *Cutbush* v. *Cutbush* (4) is to the same effect. In *McNeillie* v. *Acton* (5), Turner L.J. says that there is no case which has gone to the extent of saying that a mere direction to continue the trade is to operate as a charge of the trade debts contracted in continuing the trade on all the estate of the testator. If the argument for the creditors is correct, no payment of legacies could be made, nor could the direction to set aside certain sums for the legatees be carried out. *In re Johnson* (6) shows that, though the executor is personally liable for debts incurred by him in carrying on the trade pursuant to the will, he has the right to resort for his indemnity to the specific assets directed to be employed, but no further. Jessel M.R. there refers to *Ex parte Garland* (7), and the judgment of Turner L.J. in *Ex parte Edmonds* (8) to the effect that *Ex parte Garland* (7), and the other cases referred to, "proceeded on the principle that the executor or trustee directed to carry on the business, having a right to resort for his indemnity to the

(1) 26 Ch. D. 19.
(2) 3 Madd. 138.
(3) 1 My. & K. 116.
(4) 1 B. 184.
(5) 4 D. M. & G. 744.
(6) 15 Ch. D. 548.
(7) 10 Ves. 110.
(8) 4 D. F. & J. 488.

M. R. 1914.

O'NEILL v. McGRORTY.

assets directed to be employed in carrying it on, the creditors of the trade are entitled to the benefit of that right, and thus become creditors of the fund to which the executor or trustee has a right to resort." In *Frazer* v. *Murdock* (1) the House of Lords recognizes the principle of *Ex parte Garland* (2); *Ex parte Richardson* (3); *Cutbush* v. *Cutbush* (4); and *McNeillie* v. *Acton* (5). In *Strickland* v. *Symons* (6) Lord Selborne points out that the rights of creditors who deal with a trustee carrying on business may be less than the rights of the trustee. There a tradesman, who supplied a lunatic asylum with furniture, sought to obtain payment of his debt out of trust funds, the proceeds of sale of the lunatic asylum, which had been settled on the marriage of a doctor for the benefit of his wife and children on trust for sale, with liberty to allow the doctor to carry on the asylum until it was sold. The doctor became insolvent, and the trustee of the settlement carried on the asylum, and subsequently sold it. The plaintiff recovered judgment against the doctor, and, failing payment by him, sought to make the trust funds which represented the proceeds of sale liable. The Court of Appeal, affirming the decision of Pollock B., held that, whether the trustee would or would not have been entitled to be indemnified for moneys advanced by him for the purposes of the asylum, the plaintiff had no right to recover his debt out of the trust funds, no special part of the estate having been appropriated for carrying on the asylum. In *Devitt* v. *Kearney* (7) the Court of Appeal in Ireland held that an executrix, who was directed to carry on a business, had an implied power to mortgage freehold premises upon which it was carried on. The Court there recognizes the English decisions that, if there be a general direction by a testator that his business should be carried on after his death, only the property embarked in such trade at the time of the testator's death becomes liable to the trade creditors. *In re Morris* (8) shows that an implied power to carry on trade is the same as an express power. The Master of the Rolls there says that the ordinary rule is that where executors carry on

(1) 6 A. C. 855.
(2) 10 Ves. 110.
(3) 3 Madd. 138.
(4) 1 B. 184.
(5) 4 D. M. & G. 744.
(6) 26 Ch. D. 245.
(7) 13 L. R. Ir. 45.
(8) 23 L. R. Ir. 333.

the trade of their testator in pursuance of a direction, express or implied, contained in the will, they are entitled, should any loss occur, to be indemnified out of the testator's estate to the extent of the assets employed in the trade at his death.

The executor cannot touch any portion of the assets for the trading, unless the will authorizes him to do so. Here the executor was directed to withdraw £5000 from the business, and invest it in consols. Once the £5000 was withdrawn and invested, it ceased to be applicable to trading purposes. The court, when it directed the business to be carried on, merely carried out the trusts of the will. It did not make a new trust—a new will. The person authorized by the court to carry on the business has no greater authority or right of indemnity than the executor. Further, the legatees were infants, and there was no inquiry whether the carrying on was for their benefit or not. In *Boehm* v. *Goodall* (1), Warrington J. held that a receiver, who was appointed in an action for dissolution of partnership to carry on the business with a view to a sale as a going concern, could only look to the assets under the control of the court for his indemnity, and not to the partners personally. He there distinguishes the position of a receiver from that of a trustee, who is entitled in a proper case to be indemnified by his beneficiaries.

Pigot, K.C., for the plaintiff (the executor):—

I take no part in the argument. The executor is under no personal liability here, because the debts that are unpaid were incurred after the decree, and after the appointment of the manager.

Poole:—

It was at first argued that there was no limit to the assets which might be employed in the business. It is now suggested that, though the assets to be employed were limited to the trade assets, yet the right of indemnity is not to be confined to them, but extends to the whole of the personal estate. There is no authority supporting such a contention. The will directed the executors—1, to set apart for the legatees assets not included in

(1) [1911] 1 Ch. 155.

M. R. 1914. O'NEILL v. McGROHTY.

the business; and, 2, to make up the deficiency out of the business. In the first case, the sum set apart never was an asset of the business; in the second case it had ceased to be before the debt was incurred. In neither case can the indemnity affect the sum set apart. Even if it does in the second case, here the funds sought to be charged were never a business asset. The manager has no higher right than the executor whom he has displaced. The Court cannot confer upon him such a right. In *In re British Traction and Lighting Company, Limited* (1), Swinfen Eady J. puts a receiver and manager in the same position as an executor as regards the right to be indemnified out of assets, and applies the principle of *In re Johnson* (2) to the receiver and manager of a limited company. If the manager proposes to incur liabilities, he should, in the first instance, see that there is some one to indemnify him. In *Moore* v. *M'Glynn* (3) the same point was made as here, that the right of indemnity extended to all the assets; but in that case no such question arose as here, because the will included a provision the effect of which was to authorize the continuance of the business at the expense of the whole assets (*Ib.*, at p. 337).

Babington, in reply :—

The order appointing the manager was after decree, and for the purpose of realizing the estate. It has been argued that the indemnity of the manager only extends to the trade assets, but here the whole of the assets were in the business. And even if this argument were sound in the case of an executor, it has no application to a manager appointed by the Court. His indemnity arises by virtue of his office, and of the order of the court. He is appointed in the interest of the whole estate, and his right of indemnity extends to the whole assets. A general right of indemnity may be cut down by the will, or by the executor losing his right by default; but that is not this case. The right of indemnity is general and extends to all the assets. In *Stott* v. *Milne* (4), Lord Selborne says, at page 715: "The right of trustees to indemnity against all costs and expenses

(1) [1910] 2 Ch. 470.
(2) 15 Ch. D. 548.
(3) [1904] 1 I. R. 334.
(4) 25 Ch. D. 710.

incurred by them in the execution of the trust is a first charge on all the trust property, both income and corpus." If this were not so in this case, the indemnity would be useless, because it would be confined to the assets actually locked up in the business, now represented by £300 received for insurance of the stock as against over £5000 worth of trade debts. You cannot separate the business from the assets in this case.

In Dowse v. *Gorton* (1) it was assumed that all the assets were employed in the business. In *In re Johnson* (2) the right of the executor was limited. *Ex parte Garland* (3) was decided on the basis that the general right of indemnity was cut down by the will. *In re Raybould* (4) is in our favour; the principle of *Dowse* v. *Gorton* (1) was there applied by Byrne J. to a case in which a trustee, who carried on a testator's colliery business, became liable to damages for tort in course of working the colliery. The trustee was held to have a right of indemnity out of all the assets; and the adjoining owner, who was injured, was allowed to stand in the place of the trustee in respect of the damages and costs of an action against him.

Cur. adv. vult.

May 6.

O'Connor M.R.:—

In this case an important question has been raised, involving the rights of traders dealing with a manager of a business appointed by the Court, and the rights and responsibilities of such manager. [The Master of the Rolls then stated the facts of the case as above set out, and proceeded as follows:—]

Mr. Brown, in opening the case for the trade creditors, mainly directed his efforts towards getting rid of the difficulty supposed to arise from the circumstance that the funds sought to be made available had been taken away from the general credit of the action and put to the separate credits. On a previous occasion, when the question came before the court, this point was taken on behalf of the legatees, who were interested in the separate credits, and although it is not the point on which their counsel placed their main reliance on this occasion, it requires to be dealt with.

(1) [1891] A. C. 190.
(2) 15 Ch. D. 548.
(3) 10 Ves. 110.
(4) [1900] 1 Ch. 199.

M. R. 1914. O'NEILL v. MCGRORTY.

The legal result of carrying moneys to a separate credit was stated by Lord Langdale in *In re Jervoise* (1). He there said that when a fund is carried over to a separate account it is released from the general questions, and becomes marked as being subject only to the questions arising upon the particular matter referred to in the heading of the account. It is, in effect, a declaration that the parties mentioned in the separate credit are the only parties who have a claim upon the fund, and that in any further dealings with it it will not be necessary to serve notice on any other parties. It does not by any means follow from this that, if a claim is subsequently made which, if previously put forward, would have been satisfied out of the general assets, the claimant has lost his rights against the funds which have been transferred from a general to a separate credit. This could not be so, because a creditor of a deceased is always entitled to follow assets, even when paid out of Court to legatees. It is needless to say that funds standing in Court to the separate credit of a legatee cannot stand in any more secure position than moneys actually paid to a legatee. A case which aptly illustrates the right of a creditor against a fund standing to a separate credit, and against moneys paid out to legatees, is *Gillespie* v. *Alexander* (2), in which a creditor came in late to prove his claim, and asked for payment after the assets had in part been carried to the separate credit of legatees, and in part paid out of Court to other legatees. There Lord Eldon allowed payments out of the separate credits, but, as an injustice would have been done to the legatees whose legacies were standing to the separate credits if the whole amount of the debt was paid out of them, he directed that only proportionate amounts should be paid thereout, and that the creditor should be allowed to follow the paid legacies for the proportionate amounts which they ought to bear. More recent cases confirm the liability of funds to claims arising in an action, even though the funds have been carried to separate credits. In *In re Eyton*, *Bartlett* v. *Charles* (3), funds were carried over to the separate credit of "the account of the perpetual annuity of the defendant

(1) 12 B. 209.
(2) 3 Russ. 130.
(3) 45 Ch. D. 458.

and her issue." Subsequently it was discovered that the defendant was under a liability to the estate which was being administered in the action, and an application was made to have the liability made good out of her interest in the fund standing to the separate credit. The application was opposed by parties in whose favour the defendant had charged her interest, and it was held that, as they had dealt with the defendant on the faith of the order of the Court carrying the fund to a separate credit, they had acquired a title which could not be defeated, but that as against the defendant herself the money could have been recalled or stopped to make good her liability in the action. To the same effect is the decision in *Edgar* v. *Plomley* (1). These cases clearly establish that the mere fact that funds have been carried to separate credits does not free them from liabilities which would attach to funds standing to a general credit.

Mr. Meredith, counsel for the legatees, did not, however, rest his case on their behalf on the separate credits. In an able argument he relied upon the principles of law which regulate the carrying on by personal representatives of the trading of a deceased. He commenced with the general proposition that a personal representative has no authority to carry on the trading. His next proposition was, that if he gets special authority by the will of his testator to continue his trading, the personal representative can only trade with the assets which had been employed in the business, and that any liability incurred by the personal representative in such trading can only be discharged out of these assets. An exception to this would of course be a case in which a testator had given express authority to employ a part or the whole of his general assets in the business. In such case the personal representative would not be confined for his indemnity to the assets employed by the testator in the business, but would be entitled to look to the other assets which he was authorized to trade with. These several propositions, as general propositions, cannot be disputed. They have been long well established, and have received ultimate confirmation from the judgments of Lord Herschell and Lord Macnaghten in

(1) [1900] A. C. 431.

M. R. 1914.

O'NEILL v. McGROHTY.

Dowse v. *Gorton* (1). I think, however, that these general propositions must be taken with some limitations. Take, for instance, the case of a personal representative without any authority to trade—an executor who gets no such authority by the will, or an administrator. His duty is to realize the assets to the best advantage. He finds as part of the assets a valuable business with stock-in-trade, outstanding debts, and goodwill. If he immediately stops the trading, and shuts down the business concern, he must sell the assets at break-up prices, and destroy perhaps a most valuable asset, goodwill. Any personal representative acting in this way, except under absolute necessity, would certainly receive very severe criticism, if he could not be charged with breach of trust. His duty would be, if possible, to carry on the trading for such time as would be necessary in order to sell the business as a going concern. What would be the right of indemnity for an executor or administrator carrying on the business during such an interval? I cannot conceive any equitable principle which would confine his indemnity to the assets employed by the deceased in the business. A personal representative is entitled to be indemnified against all expenses properly incurred in the administration of the estate. For instance, he finds as an item of assets a bill of exchange. He finds himself obliged to sue on it. He incurs heavy legal expenses, quite justifiably and without any recklessness. He gets judgment against the debtor, who then becomes a bankrupt, with the result that not one penny of debt or costs can be recovered. It has never been suggested that in such a case the personal representative could only have got his indemnity out of the particular item of assets in respect of which the expenses were incurred. I can see no essential difference between such expenses and the expenses incurred in carrying on a business for the mere purpose of selling it to advantage. Both are expenses incurred in realization, and in principle should be treated in the same way. Lord Herschell recognizes this in *Dowse* v. *Gorton* (1). He says, at page 199:—"The executors would, no doubt, be entitled to carry on a business of the testator for such reasonable

(1) [1891] A. C. 190.

time as was necessary to enable them to sell his business property as a going concern, and would, even as against his creditors, be entitled to an indemnity in respect of the liabilities properly incurred in so doing." It is therefore not universally true that a personal representative has only the business assets to look to for his indemnity when he has no authority from the will to trade with other assets. In the application of this proposition special circumstances must be considered.

Mr. Meredith, having established his general proposition limiting the personal representative's right of indemnity, proceeded to deal with the right of indemnity possessed by a manager of a business appointed by the Court, in lieu of the personal representative, to carry on the business; and he laid down the further proposition that the right of the manager was only co-extensive with that of the executor. I cannot find any authority for that proposition. *Boehm* v. *Goodall* (1) merely decided that the manager could look only to the assets under the control of the Court for his indemnity, and could not look to the parties to the action personally. *Burt, Boulton, and Hayward* v. *Bull* (2) decided that a manager was personally liable for goods ordered by him, but was entitled to an indemnity out of the assets of the business. The action, however, was only concerned with the personal liability, and is of no assistance on the question we are engaged with. The proposition that the right of indemnity of a manager, appointed in lieu of a personal representative or trustee, to carry on a business, is only co-extensive with that of the personal representative, and can be enforced only when the personal representative or trustee can enforce it, is certainly not a sound one. A personal representative or trustee who has made default must make good his default before he gets his indemnity. A manager's indemnity cannot be affected by the default of the personal representative, because he is often appointed to stop and remedy breaches of trust committed by the personal representative. Surely it would be the grossest injustice to prejudice a manager appointed under such circumstances by the defaults of the persons who were superseded by the Court. But this does not dispose of

(1) [1911] 1 Ch. 155.

(2) [1895] 1 Q. B. 276.

M. R. 1914. O'NEILL v. McGRORTY.

Mr. Meredith's argument, because he says that, apart altogether from any limitations of the right to indemnity arising from breach of trust or default, a personal representative carrying on a trade under the authority of the will is confined for his indemnity to the assets embarked therein by the testator, unless he gave authority to pledge outside assets, which he did not in the present case. His next proposition was that, as the manager is appointed to carry on the business in lieu of the executor, he cannot be entitled to any more extensive indemnity. I cannot accept this conclusion, and for this reason: The executor may have been carrying on the trade under the authority contained in his testator's will, in which case he would be confined for his indemnity to the assets with which he was authorized to trade. The receiver may be appointed for another purpose, viz., to stop the trading as soon as possible, and to continue it only so long as was necessary to sell the business advantageously. This latter would be only incidental to the realization of the assets, and the expenses would be part of the expenses of administration, and payable out of the general assets. This seems to show that the receiver's right to indemnity must be independent of the right of indemnity of the personal representative who has been trading. Is the limit of the indemnity then to depend upon the purpose for which the receiver is to be appointed? Surely not, because then a receiver, before accepting his office, should make a minute inquiry into the proceedings in the action in order to see what his rights would be. He would also be bound to inquire during his receivership whether the reason for his appointment was the reason for continuing him in his office, because it is quite conceivable that a receiver might be appointed merely for the purposes of a sale, and that a sale might turn out to be unnecessary, and that the receiver might be continued for the purpose of preserving the business for a residuary legatee or other person. There would thus be a varying right of indemnity as the purpose changed. I must look then for some other principle on which a receiver's or manager's right of indemnity is to be ascertained. Is it to be found in the rule that a receiver must look for his indemnity to the property over which he is appointed? I think not, because I find it inconsistent with the principle that

the expense of realization is part of the general expenses of administration payable out of the general estate of a deceased, for I cannot separate the expenses of receivership or managership, called into existence for no other purpose than that of effecting a successful sale, from the general expenses of administration. Failing, then, all other satisfactory propositions, I fall back upon this—that all the expenses and liabilities occasioned by a receivership or managership should be borne by the trust estate for the benefit of which the receiver or manager was appointed. In the present case the manager was appointed in the interest of the whole trust estate out of which the legacies were payable.

It seems then only equitable that the legacies should bear the burden; and this result is in harmony with the general principle that a trustee is entitled to be indemnified for liabilities properly incurred, out of the entire trust estate. Here the general personal estate, which included the business, was one trust estate, because every part of it was subject to one paramount trust, viz., the payment of the legacies.

I am quite satisfied that the conclusion I have come to is in accordance with equitable principles, and I feel some gratification in being able to avoid a decision which would mean a crushing liability, if not bankruptcy, for an officer of the Court, and the sore disappointment of traders, who no doubt extended their credit to him on account of the official position which he occupied.

I will give a declaration in the terms of the relief asked by the summons. The personal representative will have his costs as part of his general costs in the matter. The legatees will in like manner have their costs, and the creditors their costs with their demand, including the Hibernian Bank.

Solicitors for the plaintiff: *Thomas F. O'Connell & Son.*
Solicitor for the creditors: *Frederick G. Dickson.*
Solicitors for the Hibernian Bank: *D. & T. Fitzgerald.*
Solicitors for the legatees: *Baker, Ringwood, and Gordon.*

W. L.

Barton J.
1914.

STEELE *v.* STEELE (No. 2).

Nov. 16, 26. *Land Purchase Acts—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 24, *sub-s.* 8 *—Sale by landlord to tenants—Subsequent devise of real estate by landlord —Sum equivalent to one year's arrears of rent—Whether payable to devisee or to residuary legatee.*

A testator, who was the absolute owner of real estates, by his will, executed in 1899, devised these estates to R. S. for life, with remainder to his first and other sons in tail male, with remainders over, and appointed J. S. his residuary legatee. In January, 1906, the testator entered into agreements under the Irish Land Act, 1903, for the sale of the estates to his tenants. On the 7th February, 1906, the testator executed a codicil which effected a republication of the will, and operated as a bequest of the purchase-money upon the trusts applicable to the real estates devised by the will (see *Steele* v. *Steele*, [1913] 1 I. R. 292, 299). The final schedule of incumbrances in the Land Commission matter comprised, at item "A," a sum equivalent to the arrears of rent due at the date of the agreements for purchase of the holdings, but not exceeding one year's rent, payable in pursuance of sect. 24, sub-s. 8, of the Irish Land Act, 1903.

Held, that this sum was payable to the residuary legatee, and did not pass under the devise of the lands.

ORIGINATING SUMMONS.

Robert Ball Steele, late of Dublin, executed his last will on the 25th November, 1899, in the following terms :—"Whereas I am absolute owner of certain estates situate in the counties of Kildare and Dublin, I hereby charge my said estates with the following annuities" (here follow certain annuities); "and, subject to said annuities, I devise my said estates to and to the use of my elder son, Robert Ball Steele, for his life, with remainder to his first and other sons in tail male, with remainder in default of such issue male to my younger son, John Treacy Steele, for life, with remainder to his first and other sons in tail male, and failing such to my own right heirs. I bequeath to my daughter, Anne Treacy Steele, all my household goods, furniture, and effects, save my pictures and plate, which pictures and plate I bequeath to

my said elder son, Robert Ball Steele. I appoint my son, John Treacy Steele, my residuary devisee and legatee, and I appoint my son-in-law, Arthur J. M'Cormick, executor of this my will."

The testator was absolute owner in fee-simple of the said estates; the Kildare estate comprising thirty-six holdings in the occupation of tenants, and the Dublin estate comprising five holdings in like occupation.

On the 1st January, 1906, the testator signed thirty-one agreements with thirty-one tenants on the Kildare estate for the sale to them of their holdings under the provisions of the Irish Land Act, 1903. On the 1st February, 1906, the testator signed agreements with the five tenants on his Dublin estate for the sale to them of their holdings under the Act. The originating applications were lodged in the Irish Land Commission in February, 1906.

On the 7th February, 1906, the testator executed a codicil to his said will, whereby he revoked the appointment of Arthur T. M'Cormick as executor of his will; and, having appointed Robert Ball Steele to be executor in his place, he added the words: "I confirm my said will in other respects."

The testator died on the 23rd May, 1906, and his will was duly proved by the executor. By an order of Barton J., affirmed by an order of the Court of Appeal dated the 21st April, 1913 (see *Steele* v. *Steele* (1)), it was declared that the purchase-money of such portions of the real estate of Robert Ball Steele as the said Robert Ball Steele in his lifetime agreed to sell to the occupying tenants thereof pursuant to the provisions of the Irish Land Act, 1903, were subject to the limitations of the real estate of the said Robert Ball Steele contained in his said will.

On the 30th day of June, 1914, the final schedule of incumbrances was ruled in the Land Commission matter. The schedule comprised, at item "A," a sum equivalent to the arrears of rent due at the date of the agreements for purchase of the holdings, payable in pursuance of sect. 24, sub-s. 8, of the Irish Land Act, 1903.

The plaintiff filed an objection to the final schedule claiming that he, as residuary legatee under the will, was entitled to the

(1) [1913] 1 I. R. 292, 299.

Barton J. 1914. STEELE v. STEELE (No. 2).

sum set forth at item "A"; and the defendant, Robert Lawrence Ball Steele, filed an objection claiming that this sum formed portion of the purchase-moneys of the said estates and should be paid to the trustee of the settlement created by the will and codicil of the said Robert Ball Steele.

Wylie J. directed payment of item "A" to Robert Lawrence Ball Steele as executor of Robert Ball Steele, without prejudice to the decision of the question by the Chancery Division.

The present summons was brought by the residuary legatee for the decision of the questions: (1) whether the said arrears of rent formed portion of the capital moneys subject to the trusts of the settlement created by the will and codicil; or (2) whether the said sum formed portion of the residuary personal estate of Robert Ball Steele.

C. Murphy, for the plaintiff:—

Item "A" represents a sum not exceeding one year's arrears of rent due at the date of the purchase agreements. It is always inserted on the final schedule in the Land Commission as a separate item independent of the purchase-money: section 24, sub-s. 8, of the Irish Land Act, 1903. The question up to the present has only arisen in the case of a vendor who was tenant for life, but there is nothing in the section which limits it to such a case. In *In re O'Ferrall's Estate* (1) this item was held to be payable to the vendor to the prejudice of incumbrancers upon the lands. It is independent of the purchase-money. The previous decision in the present case of *Steele* v. *Steele* (2) is in my favour. It decided that the will, having been republished after the date of the purchase agreements, operated as a bequest of the purchase-money as if it was a devise of the lands. The testator must be presumed to have known of sect. 24, sub-s. 8. If there had been no sale, the devise of the lands would not have comprised the arrears of rent, which would have fallen into the residue as part of the personal estate. The intention of the testator was that item "A" should pass in the same way as the arrears would have

(1) [1913] 1 I. R. 17. (2) [1913] 1 I. R. 292, 299.

passed if the estate had not been sold. [He also referred to *In re Crosbie's Estate* (1); *In re Bandon's Estate* (2); *In re Ashbrook's Estate* (3).]

Oliver Murphy, for the defendants, the executor and the public trustee:—

Section 35 of the Land Act, 1896, provides that all arrears of rent due at the date of the purchase agreement are to be extinguished. The purchase-money in this, as in all other cases, is one undivided whole. Section 24, sub-s. 8, of the Act of 1903, was only intended to give compensation to a tenant for life, who would otherwise lose the arrears due at the date of sale. If the testator in the present case had lived, he would have been entitled to the whole of the purchase-money; therefore the bequest in the will must be taken to operate upon it. The cases referred to show that section 24, sub-s. 8, can only be applied in the case of a vendor who is a limited owner as against the remainderman, or possibly in the case of a vendor who is absolute owner as against an incumbrancer. I rely on *Weeding* v. *Weeding* (4), where Lord Hatherley (at p. 431) says, "There is sufficient indication of an intention to pass the property to give to the devisee all the interest, whatever it may be, that the testator had in it."

C. Murphy, in reply:—

There is nothing in section 24, sub-s. 8, referring to compensation to a tenant for life. The section is perfectly general in its terms. The statement in *Weeding* v. *Weeding* (4) does not apply to the present case. "All the interest" means the *corpus* of the property. In the option cases the rents and profits have been held to belong to the devisee up to the date of the exercise of the option.

Cur. adv. vult.

(1) [1907] 1 I. R. 116.
(2) [1908] 1 I. R. 120.
(3) [1909] 1 I. R. 157.
(4) 1 J. & H. 424.

Barton J.
1914.

STEELE
v.
STEELE
(No. 2).

Nov. 26.

BARTON J. :—

The question for decision on this summons arises upon the construction of the will of the late Robert Ball Steele, deceased. It relates to a sum of £374 10*s.* 1*d.*, which Wylie J., in ruling the final schedule of incumbrances affecting the proceeds of the sale of testator's lands in the Irish Land Commission, has directed to be paid to the executor of the testator *in usum jus habentis*. This sum, which is at item A in the schedule, represents the equivalent to the arrears of rent in respect of the testator's estates due at the date of the purchase agreements, which to the extent of rent not exceeding in any case one year's rent is payable in pursuance of section 24, sub-s. 8, of the Irish Land Act, 1903.

The late Robert Ball Steele, by his last will, dated 25th November, 1899, devised his real estates in Kildare and Dublin, charged as therein, to the defendant Robert Lawrence Ball Steele for life, with remainders over, and appointed the plaintiff, John Treacy Steele, his residuary legatee. Under the will, the arrears of rent to which the item is equivalent would, of course, pass to the residuary legatee.

In 1906 the testator had entered into agreements with certain tenants on his said estates for the sale to them of their holdings under the Irish Land Purchase Act, 1903, and originating applications had been sworn in January, 1906, and lodged with the Irish Land Commission in February, 1906. On the 7th February, 1906, the testator duly made a codicil appointing the defendant his executor, and in other respects confirming the said will. The testator died on the 23rd May, 1906, and probate of his will has been granted to the defendant. There were some arrears of rent due at the date of the agreements for purchase; and in *Steele* v. *Steele* (1) it was held by the Court of Appeal, affirming this Court, that the codicil effected a republication of the will, and that the purchase-money of the lands contracted to be sold by the testator in his lifetime passed to the defendant for life, as devisee of the estate, with remainders over.

There is nothing in that decision which would prevent the

(1) [1913] 1 I. R. 292, 299.

arrears of rent due to the testator at the date of the agreements, and at the date of his death, passing to the residuary legatee.

The arrears became subject to the provisions of sect. 24, sub-s. 8, of the Irish Land Act, 1903, which provides that in the case of the sale of an estate a sum equivalent to the amount of the arrears of rent due at the date of the agreement for purchase, but not exceeding one year's rent, shall be paid out of the purchase-money to the person who would have been entitled to receive those arrears for his own use.

In pursuance of that section this sum of £374 10*s.* 1*d.*, which is item A in the schedule of incumbrances, has been paid to the executor of the vendor by Wylie J. It is now contended that the effect of the sub-section is to alter the natural construction of the testator's will, and to pass the equivalent of the arrears to the devisee of the testator's lands, instead of to his residuary legatee. Mr. Oliver Murphy put his point in a forcible sentence. He said that the testator by the operation of this section "threw his arrears into the melting-pot, and got back an equivalent for them as purchase-money," and that as part of the purchase-money they pass to the devisee of the testator's lands.

I am of opinion that the sub-section has not the effect of defeating the testator's intention, or of altering what would be the ordinary and natural construction of his will. The section was lucidly explained by Ross, J., in *O'Ferrall's Estate* (1). The object of the section was to facilitate sales by making a sum equivalent to one year's rent payable to a tenant for life. Formerly such arrears were wiped out, and were added to the purchase-money, thus becoming the property of the remainderman. But, while the section was intended specially for the case of a tenant for life, it is general in its application. The result is that the vendor, if he is an absolute owner, gets an equivalent in exchange for his arrears. Ross J. spoke of it as "a part of the purchase-money earmarked for the purpose, and distinct from the rest of the purchase-money," and expressed the opinion that, in the case before him, it would be contrary to the express words and spirit of the

(1) [1913] 1 I. R. 17.

Barton J. 1914.

STEELE v. STEELE (No. 2).

section to allow the sum so preserved for the vendor to be pooled with the general purchase-money of the estate.

Similarly, in the present case, I am asked to pool this equivalent for arrears with the general purchase-money, so as to defeat the testator's intentions, and to deprive the residuary legatee of the money, which, according to the intention of the testator, and the ordinary construction of the will, would pass to him.

This item is, it is true, in one sense, added to the purchase-money; but it is earmarked and distinct from the rest of the purchase-money. It is an equivalent for arrears, and passes under the will in the same way as the arrears, to which it corresponds, would have passed.

I thought at first, and still think, that the case is a very clear one, and I only reserved judgment in deference to Mr. Oliver Murphy's able argument on behalf of the defendant. The answer to question 1 will be "No"; and to question 2, "Yes."

Solicitors for the plaintiff: *Milward Jones & Cameron.*
Solicitors for the defendants: *Moore, Keily, & Lloyd.*

D. M. S.

IN THE MATTER OF THE ESTATE OF THOS. L. CARROLL.

Wylie J.
1914.
Dec. 15.

Land Purchase Acts—Practice—Charges in equal Priority affecting the Purchase-money of Lands sold under the said Acts—Varying Amounts due for Arrears of Interest thereon—Deficiency of Purchase-money—Procedure regarding Payment.

Where there are charges in equal priority affecting the purchase-money of lands sold under the Land Purchase Acts, with varying amounts due thereon for arrears of interest, and the purchase-money is insufficient to satisfy the claims, on allocation the amounts due for arrears of interest will, in the absence of special grounds, first be paid in full, and the balance of the purchase-money distributed in proportion to the capital value of the charges.

QUESTION arising on allocation.

Appearing on the final schedule of incumbrances, affecting the purchase-money of the lands sold in this matter under the Land Purchase Acts, were two charges of £1500 each, in equal priority. The claimant to one of these charges was Miss Kathleen Carroll, a person of unsound mind, claiming by her committee, Sir A. F. Baker, appointed by order dated the 5th December, 1914. The amount vouched as due for arrears of interest thereon was £227 1*s.* 6*d.* The claimant to the other charge was Miss Oonah Carroll. The amount vouched as due for arrears of interest thereon was £78 1*s.* 6*d.* The total amount due for principal and interest on foot of the two charges was £3305 3*s.* The total amount of purchase-money, with bonus added, available to meet these claims was £3073 18*s.* 7*d.* The charge of Miss Oonah Carroll was subject to a mortgage to the Munster and Leinster Bank, which captured everything coming to her on foot of her charge.

The Examiner had made the following ruling:—"I have not drafted any order pending the decision of the Judge as to how the arrears of interest of unequal amounts are to be dealt with, having regard to the insufficiency of the funds to meet them in full. I think that the practice in the Land Judge's Court is to pay them in full, and then to divide the balance in equal shares.

Wylie J. 1914. *In re* CARROLL'S ESTATE.

On the other hand, if the principal were added to the arrears in each case, and the sum available divided in that proportion, the Munster and Leinster Bank would receive more. It has apparently not been decided in a case like the present, where there are two charges in equal priority with varying amounts due for arrears of interest, and a deficiency in the purchase-money, what is the proper course to adopt regarding payment."

Pigot K.C., for the Committee:—

The full arrears of interest on each charge should first be paid, and the balance of the purchase-money then divided equally on account of principal.

M'Cann K.C., for the Munster and Leinster Bank:—

The course suggested would penalize the diligent chargeant who had insisted on being paid. We submit that the arrears of interest should be added to the principal in each case, and the purchase-money divided in the proportion of the sums so ascertained.

WYLIE J.:—

In my opinion, in the absence of all evidence accounting for the unequal payment of interest, the equitable course to adopt is first to pay all arrears of interest, and then divide the balance of the purchase-money in the proportion of the capital value of the charges. I will distribute the available balance on this basis.

Solicitor for the Committee of the estate of Kathleen Carroll: *Sir A. F. Baker.*

Solicitor for the Munster and Leinster Bank: *John Stanton.*

J. E. W.

WOODS AND OTHERS *v.* BROWN AND OTHERS (1).

Appeal.
1914.
April 27, 28.

Judgment Mortgage—Registration—Joint Judgment—One Affidavit including Several Parcels of Land belonging to Different Owners—Order of Court directing Taxing Officer to select Parties to get Costs—Registration of Order as Judgment Mortgage—Validity—Sale of Lands through Court—Investigation of Title before Sale—Depreciatory Conditions—Re-opening Buildings—Judgment Mortgage Act, 1850 (13 & 14 *Vict. c.* 29), *sect.* 6—*Sales by Auction Act*, 1867 (30 & 31 *Vict. c.* 43)—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *sect.* 70.

In an action by several joint plaintiffs against several joint defendants to determine the right to take seaweed on a certain portion of the seashore, judgment was given in favour of the defendants, with a direction in the order that the taxing officer should select whether two or three of the said defendants should get their costs. The taxing officer having selected three of such defendants, judgment for the amount of their taxed costs was registered as a judgment mortgage against three several separate parcels of land, belonging respectively to three of the plaintiffs in that action, upon a single affidavit made by one of such three defendants. Afterwards, upon an originating summons, the said defendants obtained an order declaring that the said judgment mortgage was well charged on the said lands, and a direction for the sale of one of such parcels. The judgment debtors did not appear on this application, and no appeal was taken from the order. The parcel was sold at a sum exceeding the price reserved, and only 5 per cent. below the valuation obtained for the purpose of the sale, but under conditions which were in fact depreciatory. The sale was confirmed by the Chief Clerk. Subsequently, by leave of the Court, James Brown, the owner of the parcel, applied for an order that the sale be set aside and declared void, and no steps taken in respect of the re-sale thereof until the ownership had been finally decided.

Held, by the Court of Appeal, that the order of Barton J., declaring the judgment mortgage well charged on the lands, not having been appealed from, was conclusive as to the validity of the registration.

Held, also, that there being no element of fraud the sale should not, in the circumstances, be set aside.

Held, by Palles C.B. and Holmes L.J., O'Brien L.C. inclining to the same opinion, that a judgment against three persons may be registered by one affidavit as a judgment mortgage against the separate property of each of the judgment debtors.

(1) Before O'BRIEN L.C., PALLES C.B., and HOLMES L.J.

Appeal. 1914. WOODS *v.* BROWN.

Quære: Was the order of Barton J., referring the question to the taxing officer to determine which of the defendants should get their costs, an order which could be the subject of a valid registration as a judgment mortgage?

APPEAL from an order of Barton J., refusing an application upon summons on behalf of one of the defendants, James Brown, for an order that the sale of a certain farm of land at Mullabane, his property, be set aside and declared void, and that no steps be taken in respect of the re-sale of the said farm until the ownership thereof had been finally decided.

The plaintiffs in the present case were Peter Woods, John McCann, and John Coyle; and the defendants were James Brown, John Long, and Owen McArdle.

In the year 1909 an action was instituted before Barton J. to determine the right to take seaweed on the foreshore of the Stobart Estate, in the county of Louth. The defendants in the present case were three of the plaintiffs in that action, and the plaintiffs in the present case were three of the defendants in that action. On the 17th May, 1911, Barton J. gave judgment in the action in favour of the defendants, with costs, embodying in his order a direction that the taxing master should select whether two, or three, of the defendants should recover their costs. In pursuance of this direction the taxing master selected the defendants Peter Woods, John McCann, and John Coyle (the plaintiffs in the present summons), and their costs were duly taxed to the sum of £269 18*s*. On the 13th April, 1912, judgment for this sum was registered as a judgment mortgage, upon an affidavit sworn by the defendant Peter Woods, against the following denominations:—(1) The farm of land aforesaid, portion of the townland of Mullabane, held by the aforesaid James Brown; (2) certain premises and lands, portions of the townlands of Irishgrange and Monksland, held by the aforesaid John Long; (3) certain lands, portion of the townland of Benagh, held by the aforesaid Owen McArdle.

On the 25th April, 1912, the present proceedings were commenced by an originating summons, issued by Peter Woods, John McCann, and John Coyle, against James Brown, John Long, and Owen McArdle, to have it declared that the judgment mortgage

was well charged upon the said lands, and for an order for a sale of the said farm at Mullabane, held by the said James Brown; and on the 18th June, 1912, an order was made by Barton J., declaring that the judgment mortgage was well charged on the said lands, and directing a sale of the farm at Mullabane. James Brown did not appear on these proceedings. The farm was subsequently put up for sale, the Court directing a valuation to be made by a competent valuer, who valued the lands at £630, and upon obtaining such valuation the Court fixed a reserve price of £580. The conditions of sale contained, *inter alia*, the following:—(*a*) "The purchaser shall conclusively admit that the tenant's interest in the said holding became by transfer of possession without deed or note in writing absolutely vested in the defendant, James Brown, in the year 1902"; (*b*) "The purchaser shall conclusively admit that James Brown has been in exclusive occupation of the said holding since his marriage on the 13th January, 1902." The sale was held on the 27th October, 1913, and the only bid was one of £600 by William Duffy. When the sale came before the Chief Clerk for confirmation, certain of the next-of-kin of Isaac Brown, the father of James Brown, appeared, and objected to the sale being confirmed, on the grounds that the title to the farm had not been investigated prior to the sale; that they had an interest therein as next-of-kin of Isaac Brown; that the conditions above mentioned were depreciatory, and that the sale was at an under value; and in the alternative they offered a sum of £700 for the farm. The Chief Clerk, notwithstanding these objections, confirmed the sale to William Duffy at £600. Afterwards, on a summons taken out by the executor of Isaac Brown, it was held by Barton J. that James Brown had a good title to the farm; and on the 30th January, 1914, James Brown, by leave of the Court, issued a summons for an order that the sale be set aside and declared void, and no further steps taken in respect of the sale until the ownership of the farm had been finally decided. It was argued in support of this application that questions relating to the title to the farm should have been determined before the farm was put up for sale, and that the conditions of sale were depreciatory. Barton J. dismissed this summons, and from this dismissal the present appeal was taken.

Appeal. 1914.

WOODS v. BROWN.

Serjeant Sullivan K.C. and *Denis Henry K.C.* (with them *Dickie*), for the appellant:—

The joint judgment cannot be registered by means of one affidavit against different denominations belonging to different persons. The section applicable is the 6th section of the Judgment Mortgage Act, 1850, which enacts that "where . . . the creditor under any such judgment, decree, order, or rule shall know or believe that the person against whom such judgment, decree, order, or rule is entered up, obtained, or made is seised or possessed at law or in equity of any lands, tenements, or hereditaments . . . it shall be lawful for such creditor . . . to make and file . . . an affidavit . . . stating that to the best of the knowledge and belief of the deponent the person against whom such judgment, decree, order, or rule is entered up, obtained, or made is . . . seised or possessed or has such disposing power as aforesaid, of or over such lands, tenements, or hereditaments." That section cannot be read distributively. Though the word "person" in the section may be read in the plural, yet the lands must be the property of all the persons; they must all have an interest in them, for the words "person" and "lands" are linked together in the section. There is no precedent for combining in one affidavit three several mortgages against three several sets or parcels of lands belonging to three different persons.

The registration also is bad because it is based not on the judgment, but on the taxing master's certificate. It is not a registration of a concluded judgment, but at most of a judgment and a certificate of the taxing master.

There was no jurisdiction to order the sale of this farm upon an originating summons; the title to the lands was undisposed of, and the Court cannot adjudicate upon the rights of third parties upon originating summons: *In re Powers, Lindsell* v. *Phillips* (1); *In re Carlyon* (2); *In re Bridge, Franks* v. *Worth* (3); *In re Giles, Real and Personal Advance Co.* v. *Michell* (4).

The Court should have investigated the title before the sale. The conditions were depreciatory; in fact, Brown had a good title, but what was offered for sale was a mass of litigation.

(1) 30 Ch. D. 291.
(2) 56 L. J. Ch. 219.
(3) 56 L. J. Ch. 779.
(4) 43 Ch. D. 391.

[They also referred to *Kennedy* v. *De Trafford* (1); *Jones* v. *Barnett* (2); *Guest* v. *Smythe* (3); and Sales by Auction Act, 1867 (30 & 31 Vict. c. 48).]

[*Serjeant Matheson K.C.* informed the Court that the present appellant had not appealed from the order of Barton J. declaring the mortgage well charged and directing a sale of the lands.]

Serjeant Matheson K.C., *Jellett K.C.*, and *Young*, for the respondents, and

Williamson K.C. and *Cusack*, for the purchaser Wm. Duffy, were not called on.

O'BRIEN L.C.:—

I think that some of the matters which were discussed in this Court were not discussed in the Court below, but of course it is open to the appellant to raise every objection that he legitimately can.

An action was brought by four plaintiffs against several defendants—seven in number—before Barton J., in 1909; and in the result judgment was given for the defendants. The plaintiffs in the present action were three of the defendants in that action. The costs were in that first action given to the defendants, but there was reserved to the taxing master, whether regularly or irregularly I do not decide, a power to determine which of the defendants were to get those costs. He determined that the three defendants who are the present plaintiffs were to get them, and in so far as form is concerned a judgment mortgage was registered against the lands of the appellants in this case.

Two objections have been raised to the validity of the judgment mortgage: first, that to constitute a valid registration there should have been an interest in all three of the defendants in all the lands, the subject of the registration, and that it would be a bad registration if the lands are (as these are stated to be) three separate parcels belonging to three separate parties. That

(1) [1897] A. C. 185.
(2) [1900] 1 Ch. 374.
(3) L. R., 5 Ch. A. 556.

Appeal. 1914. WOODS v. BROWN.

contention does not seem to me to have much force in it, if it were necessary to decide the point; and I cannot at present see why the section should not be read so as to include such a case.

O'Brien L.C.

The other objection would be a more formidable one if raised in time, namely, that the order which was made by Barton J., referring the question to the taxing officer as to which of the defendants was to get costs, was not such an order as could be the subject of valid registration. This is a serious point, but, in the view that I take, it is not now open to us to consider it.

An originating summons was issued under Order LV by those who had registered the judgment mortgage against the lands of the defendants, to raise the amount of the judgment by the sale of the lands. An order was made declaring that it was a good judgment mortgage, and well charged on the lands, and in addition an order for the sale of the lands was made. The defendants did not trouble to appear on that application. Then the Court in ordinary course had a valuation of the lands made for its own information, so that at the sale the lands should not be disposed of at an unfair price, and on that valuation, which was made by a competent valuer in the ordinary course with full information before him as to the nature of the interest for sale, a reserve price of £575 was put on the premises. They were put up for sale, and a sum slightly in excess of that amount was bid. After consideration the Chief Clerk confirmed the sale in the ordinary way.

Section 70 of the Conveyancing Act, 1881, enacts that "an order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction or want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not." It appears to me that the order having been made, on its face, within jurisdiction, and these questions not having been raised by the defendants, the decree and sect. 70 of the Conveyancing Act protect the purchaser, and entitle him to retain his purchase, whether the two points raised would have been, if raised at the right time, a good answer to the action or not.

But the case has also to be considered in one other

aspect. The interest in the lands was the interest of a tenant purchaser under the Land Purchase Acts. So far as valuation is concerned, the valuation was based on the value of such an interest, and the manner in which the title devolved did not affect the valuation. The question of title could not, in my view, have been placed before the valuer, who simply valued the interest as an interest in lands under these Acts. Therefore the Court had a regular, and we must assume an honest, valuation made of the property which it had jurisdiction to sell; but it is here contended that the condition of the title at the date the conditions of sale were settled was not really the condition as shown by the subsequent investigation. Whatever the method of devolution of title was, the title was one to premises held in the way I have indicated, and beyond all question, although those who had carriage of the proceedings made some mistake as to the manner in which the tenant acquired the tenancy, there is no doubt he had acquired it, and good title is now shown.

It is argued that we should now set aside the sale, even though confirmed by the Court, because certain conditions are alleged to be depreciatory. But once the Court fixed the price, and the purchaser bid the price, which exceeded the reserve, it appears to me that, there being no element of fraud, the bidder is entitled to retain his purchase of the property for which he honestly bid a price in excess of the reserve price.

In my opinion there were no irregularities in this case which can affect the order of Mr. Justice Barton.

PALLES C.B.:—

I concur. A great number of questions were raised on the opening of the appeal by Mr. Serjeant Sullivan. The first was that the registration of the judgment mortgage was irregular and insufficient to charge the lands, upon the ground that where there is a judgment against three, you cannot by one affidavit register that judgment against the separate property of the three separate persons, but that to do so three separate affidavits are necessary. Now, although—for another reason—I do not think that that question arises in this appeal, I should not wish that any doubt

Appeal.
1914.
WOODS
v.
BROWN.
Palles C.B.

upon it should exist. It appears to me to be clear that one affidavit can register the decision against the separate property of each of the defendants. I consider that the Judgment Mortgage Act of 1850 retained the effect of the previous judgment law affecting lands, subject only to this, that a course should be adopted by which the charge should appear in the Registry of Deeds, and I can find nothing in the Judgment Mortgage Act of 1850 which prescribes that in a case such as the present the judgment must be registered by three separate affidavits instead of by one. There is no difficulty in construing the words of the 6th section distributively. Before the Act there could be no doubt that a judgment against three was a joint judgment against the three, and would affect the joint property of the three, and was, in addition, a separate judgment against each which would affect the separate property of each.

A more serious question has been raised affecting the registration, viz., that the order of Barton J., referring it to the taxing master to determine the question who should have costs, was not the subject of valid registration. Upon that point I propose to give no opinion. A sufficient answer to the argument founded on it has been given by Mr. Serjeant Matheson, viz., that the primary decree in this case, which declares that this judgment is well charged on the lands, has not been appealed from, and is conclusive.

That being so, we have only to consider whether we ought to set aside the sale. I am not enamoured of the way in which it has been carried out. There were unnecessarily depreciatory conditions, as there was, in fact, a good title to the property sold. But I think that any difficulty that arose has been caused by Brown, the appellant. When the suit was instituted to sell his farm, he did not think it worth his while to appear; and, above all, when the order for sale was made, he did not give such assistance as he could to obtain the full value for the lands. Now we are asked to set aside this sale. I admit that 30 & 31 Vict. c. 48 only affects the Court of equity opening biddings on the ground of undervalue. All other objections to sales continue notwithstanding the Act. Section 7 puts an end to the former practice of re-opening the biddings, "Unless the

Court or judge shall on the ground of fraud or improper conduct in the management of the sale, upon the application of any person interested in the land . . . either open the biddings, holding such bidder bound by his bidding, or discharge him from being the purchaser, and order the land to be resold upon such terms as to costs or otherwise as the Court or judge shall think fit." That undoubtedly excepts the case of fraud or improper conduct in the management of the sale, but here I cannot say that there was either fraud or improper conduct, and the matter appears to be concluded by the provision in the section that the application of the person interested in the land must be made to "the Court or judge before the chief clerk's certificate of the result of the sale shall have become binding."

There is then only the question of alleged undervalue. I was struck at first by the statement of Mr. Serjeant Sullivan that this land was worth £1000, and that it was sold for £600. But we ascertained from the papers that in the opinion of the valuer the lands were worth only £630. The price bid here was £600, that is only 5 per cent. under the value of the valuer, and is above the price fixed as the reserve price, viz. £575. The deficiency below the £630 was probably brought about by the conduct of the defendant. There was very little known by the plaintiff's solicitor with reference to the real facts as to the title, and although I should have been better satisfied if proceedings had been taken to have had the defendant examined, and the true facts ascertained, I cannot be a party to setting the sale aside on the ground of gross undervalue. And, therefore, I am of opinion that the sale ought to stand, and that the order appealed from ought to be affirmed.

HOLMES L.J.:—

I concur. The first question is whether there exists a judgment mortgage at all. Mr. Serjeant Sullivan commenced his argument by relying on the Act of Parliament of 1850, which brought judgment mortgages into existence. He called attention to a certain section, and argued that the necessary machinery was not carried out. I was not able to follow that argument.

Appeal. 1914. WOODS v. BROWN. Holmes L.J.

We have here an affidavit applying to three people and three denominations of land, and describing them in the way the statute directs them to be described. Serjeant Sullivan requires three affidavits where there really ought to be one. The meaning of the section is as plain as language can make it. The second objection raised by Mr. Henry to the validity of the registration is a serious objection, and perhaps in another case it may arise, but it does not arise in this case, inasmuch as it has been decided by Barton J. that this was a good judgment mortgage. That might have been resisted at the time, but it was not, and as this is a judicial and a binding decision, we are bound to come to the conclusion, without expressing any opinion upon it, that the registration is valid. I agree with the Lord Chief Baron that the parties might have been more careful in investigating the title to the property, and that the conditions of sale might have been prepared in a way more favourable to the vendor. But still here we have to consider the case of a purchaser who has not been guilty of any fraud, who has been perfectly honest throughout the whole transaction, and who has bid a larger price than that fixed as the reserve price by a careful valuer. It would be very injurious to purchasers if under these circumstances, for some imaginary idea that a larger price might be obtained, we were to reopen the biddings, and set aside the sale.

Solicitor for the appellant: *James Dickie.*
Solicitors for the purchaser: *O'Hare & O'Hagan.*
Solicitors for the plaintiffs: *Sheridan & Co.*

J. M.

IN RE RICHARDSON.

MAHONY *v.* TREACY.

Barton J.
1914.
July 29.
Nov. 4.

Administration—Annuity determinable on Re-marriage—Deficiency of Assets —Valuation.

A testator by his will bequeathed two annuities, one of which was payable to the testator's widow during her life while she remained a widow, and the other payable to the annuitant for life. The estate was solvent *quâ* creditors, but was insufficient to pay the two annuities in full. In administration proceedings one of the inquiries directed was what was the value of the widow's annuity.

Held, that the value should be ascertained as if the annuity were a life annuity, and that after the amount representing such value had been rateably abated it should be invested in the purchase of a life annuity to be paid to the widow until re-marriage.

Carr v. *Ingleby*, 1 De G. & S. 362, followed.

In re Sinclair, [1897] 1 Ch. 921, distinguished.

MEMORANDUM from the Chief Clerk.

John Richardson died on the 13th of September, 1911, having previously made his last will, dated the 13th of January, 1908. By his will the testator provided that Michael Mahony, the plaintiff in the present proceedings, should while employed by the executors be paid £1 2*s.* 6*d.* a week for wages, and have the use of a house free of rent while so employed. Should he cease to be so employed, he was to be paid a pension of 15*s.* a week during his life. The testator also provided that his wife, Annie Richardson, should, during her life, while she remained a widow, be paid £2 per week, and should have a house free of rent. Subject to these two annuities testator left all his property for the benefit of his children.

Michael Mahony ceased to be employed by the executors on the 11th of October, 1911. After payment of the debts, the estate of the deceased remaining unadministered consisted of a sum of £693, the income of which was insufficient to pay in full the annuities given by the will. An order for the administration of the deceased's estate was made on the 2nd of December, 1913.

Barton J. 1914.

MAHONY v. TREACY.

One of the inquiries directed by the order was, What was the value of the annuity given to Annie Richardson?

The matter now came before the Court on a memorandum from the Chief Clerk for the opinion of the Judge whether, in ascertaining the value of the widow's annuity of £2 per week, regard should be had to the fact that her life interest in the annuity was determinable on her marriage.

Serjeant Sullivan K.C. and *M. F. Healy* for the plaintiff.

Herbert Wilson K.C. for the widow.

Rearden for the defendants, the personal representatives of the deceased.

The following cases were referred to:—*In re Sinclair* (1); *In re Blakemore* (2); *In re Batey* (3); *Carr* v. *Ingleby* (4); *Wroughton* v. *Colquhoun* (5); *Gratrix* v. *Chambers* (6).

Cur. adv. vult.

Nov. 4.

BARTON J.:—

It is admitted that these two annuitants are the only persons interested in this estate, and that, as the estate is insufficient to pay the two annuities in full, they must abate rateably. This memorandum arises out of an inquiry directed to ascertain the value of the widow's annuity, which is determinable upon re-marriage. It has been contended on her behalf that she is entitled to have her annuity valued as a life annuity, and to have the capital sum representing its value, after it has been rateably abated, paid over to her without regard to its liability to forfeiture upon re-marriage. That contention rested upon what, I think, is a misunderstanding of some passages in the judgment in *In re Sinclair* (1). It was pointed out in the course of the arguments that the editors of the last edition of Jarman observe, at p. 1137, in reference to that case, that to disregard a clause of forfeiture of an annuity of this kind "seems contrary to principle, and is certainly contrary to precedent."

In re Sinclair (1) was a peculiar case, and, having regard to its special facts, is distinguishable from the present one. The

(1) [1897] 1 Ch. 921.
(2) 5 Ch. D. 372.
(3) 14 Ch. D. 579.
(4) 1 De G. & S. 362.
(5) 1 De G. & S. 357.
(6) 2 Giff. 321.

annuitant was not a legatee under the testator's will, but a creditor under a deed executed by the testator in his lifetime. There was no question of an insufficient estate. The estate was treated as sufficient, and the whole of the value of the annuity, valued as a life annuity, had been, at an early stage of the suit, invested and placed to a separate account. There was another material circumstance in that case which is absent in the present case. Kekewich J. pointed out, at p. 927, that there was nobody who could take any advantage by a forfeiture. Accordingly Kekewich J. was evidently of opinion that he had no alternative but to pay the whole fund over to the annuitant. It cannot be suggested that Kekewich J. purported to overrule *Carr* v. *Ingleby* (1). I do not think that, in his reference to that case, he can have intended to say more than that, in view of what he had already said as to the special facts of the case before him, he did not feel himself bound to apply *Carr* v. *Ingleby* (1).

Carr v. *Ingleby* (1) was decided by Sir J. Leech V.-C., in 1831, and was reported in 1847 in connexion with *Wroughton* v. *Colquhoun* (2), which is a leading case upon this branch of the law as to the valuation of annuities in the case of an insufficient estate. *Carr* v. *Ingleby* (1) was recognized, as ruling the practice of the Court, by Sir J. Stuart V.-C., in 1860, in *Cratrix* v. *Chambers* (3), and, so far as I know, it has remained the practice of the Court ever since.

The widow's right is, in my opinion, to have her annuity valued in the first instance as a life annuity, and, after the amount representing such value has been rateably abated, to have it invested in the purchase of a life annuity to be paid to her until re-marriage.

Some reference was made to the bankruptcy rules; but they have no application to this case. This estate is not insolvent *quâ* debts and liabilities. It is merely insufficient *quâ* the beneficiaries. The bankruptcy code sometimes makes a short cut of its own, in order to discharge a bankrupt from his liabilities, and in order to carry out the other purposes of the code. For example, in the

(1) 1 De G. & S. 362.
(2) 1 De G. & S. 357.
(3) 2 Giff. 321.

Barton J. 1914. MAHONY v. TREACY.

bankruptcy code contingent annuities of this kind must be valued as such. But in the administration of estates which are not insolvent, the Court is not driven to such strong measures, and it is not the ordinary practice of this Court either to disregard a clause of forfeiture, or to insist upon such a difficult operation as the valuation in every case of the contingency of a widow re-marrying.

This memorandum, and all the proceedings in Chambers, have proceeded upon the hypothesis that these annuities are to be valued. The only question submitted to me has been the basis of valuation in the case of the widow's annuity. I am not to be understood as deciding that there is no other possible solution of the difficulty, whether by agreement between the parties, who are the only persons interested, or otherwise. This decision is limited to the narrow point which has been submitted to the Court.

Solicitor for the plaintiff: *Maurice Healy.*
Solicitor for Mrs. Annie Richardson: *Edward Fitzgerald.*
Solicitor for the defendant: *William Murphy.*

D. M. S.

M. R.: 1914. April 30. May 1, 30.

IN RE GUN.

SHEEHY *v.* NUGENT.

Will—Construction—Power of Appointment amongst Nephews and Nieces and other relations of Donee—Power of Selection—Default of Appointment—Class to take and when to be ascertained—Vesting.

A testator bequeathed all his property to his wife in the first place, and after her death to his "lawful nephews and nieces, meaning such nephews and nieces and other relations as she deems fit and suitable." There was no gift in default of appointment. The testator's widow by her will left part of the property to two nieces, and part to a grandnephew. The remainder of the property was unappointed. The testator's only next-of-kin were nephews and nieces, some of whom died in the lifetime of his widow.

Held, (1) That the power of appointment was a power of selection, and not a power of distribution, and that therefore the word "relations" was not confined to next-of-kin, and that the appointment to the grandnephew was good.

(2) That the class to take in default of appointment was confined to nephews and nieces and other relations, if any, who were next-of-kin; and that members of the class were to be ascertained at the death of the testator, and took vested interests then.

ADJOURNED SUMMONS.

M. R.
1914.
SHEEHY
v.
NUGENT.

The following statement of facts is taken from the judgment of the Master of the Rolls:—

"In this case several questions have arisen under a very short will made by Hugh Murray Gun on the 8th February, 1883.

"The material part of the will is as follows:—'I will and bequeath all my houses and lands and stock and farming utensils and moneys and whatever else I die possessed of to my wife in the first place then after her death to my lawful nephews and nieces meaning such nephews and nieces and other relations as she deems fit and suitable.' There was no gift in default of appointment.

"The testator died on the 18th February, 1883, leaving Julia Murray Gun, his widow, surviving. The will was proved by the Rev. David Quin, one of the executors. He died leaving the estate not fully administered, and letters of administration of the personal estate unadministered, with the will annexed, were granted on the 7th March, 1914, to Frances Sheehy, a niece of the testator and the plaintiff in the matter. The testator's widow survived him for many years, and died on the 31st March, 1913. She made no disposition of her husband's estate save by her will, which she made on the 24th November, 1888. By it she purported to dispose, under the powers given to her by her husband's will, of specific parts of his property. Some of the persons in whose favour she made such disposition died in her lifetime; others survived her. For the purpose of deciding what was the effect of her will as an execution of the power, it will only be necessary to mention the dispositions in favour of those who survived; the others having failed.

"To the plaintiff, Frances Sheehy, and the defendant, Jane Nugent, both of whom are nieces of Hugh Murray Gun, she left certain farms. No question arises as to these. The appointees are clearly objects of the power. To the son of the plaintiff, viz., George Fitzgerald Sheehy, who was a grandnephew of Hugh Murray Gun, she left another farm in pursuance of the power contained in his will. This appointment is challenged on the ground that George Fitzgerald Sheehy was not an object of the power, not being a nephew or a relation within the meaning of

M. R. 1914. SHEEHY v. NUGENT.

the will. There was other property of Hugh Murray Gun, which was not appointed, partly by reason of the deaths of the appointees in the lifetime of Julia Murray Gun, and partly because she made no appointment of it."

Conner K.C. for the plaintiff, Frances Sheehy, a niece and administratrix *de bonis non* of the testator :—

The first question is as to the validity of the appointment to George F. Sheehy, a grand-nephew of the testator, who was not a next-of-kin. The testator at the date of his death had no next-of-kin except nephews and nieces. Are the words "my lawful nephews and nieces meaning such nephews and nieces and other relations as she deems fit and suitable" to be construed as meaning such lawful nephews and nieces and next-of-kin as she deems suitable, or are they to be construed as including remoter relations? It is submitted that the widow had a power of distribution, and not a power of selection, and that but for Lord Selborne's Act (37 & 38 Vict. c. 27) she would have been bound to give something to each of the objects of the power. If it is a power of distribution, then it is well settled that the words "relations" is to be confined to next-of-kin: *In re Deakin*; *Stanley* v. *Eyres* (1), where the words were "to my wife's relations as she may direct": *In re Patton*; *Dunlop* v. *Greer* (2), where the words were "to and amongst my blood relations in such shares as he may think fit."

The second question is, who are entitled to the unappointed part of the property. It is clear that relations in this connection are confined to next-of-kin: *Wilson* v. *Duguid* (3); and it is submitted that the only persons who take are those nephews and nieces who survived the widow.

Meyaw, for the defendant, G. F. Sheehy, a grandnephew of the testator :—

The power is a power of selection, and the grandnephew is a proper object of the power; he was a relation not a nephew. The testator was his own dictionary; he says what he means by his

(1) [1894] 3 Ch. 565.
(2) [1899] 1 I. R. 324.
(3) 24 Ch. D. 244.

nephews and nieces. "Relations" here can only mean relations other than nephews or nieces. The word "such" is used here, showing that she had a power of selection. The word "relations" will be construed as equivalent to next-of-kin in case of default to exercise a power of appointment, but not for the purposes of appointment, where it may have a different meaning: *Grant* v. *Lynam* (1). The donee can go outside the class of next-of-kin, and she has done so here. G. F. Sheehy makes no claim in default of appointment; he is a relation for the purpose of appointment, but not a relation for the purpose of default of appointment.

W. G. Gibson K.C. (*Sealy* with him), for the defendants J. R. Dewar and J. C. Hackett, executors of R. L. Evans, a nephew of the testator, who died in the lifetime of the widow:—

Three views of the will may be put forward in support of our contention that the class of persons entitled to the unappointed property consists of the nephews and nieces of the testator who were living at his death:—(1) There was an express gift in remainder to nephews and nieces subject to a divesting power of appointment; (2) there was an implied gift in remainder to nephews and nieces in default of appointment; (3) there was an intestacy.

As to 1, *Lambert* v. *Thwaites* (2) and *Wilson* v. *Duguid* (3) show that there can be a vesting, though there may be a divesting power of appointment.

As to 2, the class is to be ascertained at the death of the donee only if the power is to be executed by the will of the donee, not when, as here, the power may be exercised by any writing: Jarman on Wills, 6th ed., p. 1647. In *Jackson's Will* (4) the representatives of a deceased child were held entitled. There the power of appointment was held to be exercisable, as here, by any writing. We rely also on *Wilson* v. *Duguid* (3) already cited. It goes in the same direction as *Jackson's Will* (4). Decisions on the word "relations" do not apply, as R. L. Evans was a nephew, and there are no next-of-kin save nephews and nieces.

As to 3. If there was no gift express or implied, there would

(1) 4 Russ. 292.
(2) L. R. 2 Eq. 151.
(3) 24 Ch. D. 244.
(4) 13 Ch. D. 189.

M. R. 1914.

SHEEHY v. NUGENT.

be an intestacy, and all the next-of-kin living at the death of the testator would take.

Serjeant Matheson K.C., for the defendant Jane Nugent, appointed by the Court to represent the class of next-of-kin of the testator living at the death of his widow:—

The appointment to G. F. Sheehy was a bad appointment. A power of appointment among the relations of the testator may be well exercised by an appointment to any relations, although not within the degree of next-of-kin, if the power authorizes selection; but if the power authorizes distribution merely, and not selection, the donee is confined to the next of kin according to the statute: Farwell on Powers, 2nd edition, p. 504. *Grant* v. *Lynam* (1), *Harding* v. *Glyn* (2), and *Pope* v. *Whitcombe* (3), are cited by the author in support of this proposition. In this will there is only a power of distribution; the gift is to a class with a power of appointment. In *Grant* v. *Lynam* (1), there was a power of selection. The power was to the wife to bequeath same "to any one of my own family she may think proper." *Harding* v. *Glyn* (2) was also a case of a power of selection. The words of the power were "to give the same unto and amongst such of his own relations as she should think most deserving." *Pope* v. *Whitcombe* (3) was a case of a power of distribution. The testator there directed his wife to dispose of the residue amongst his, the testator's, relations in such manner as she should think fit. In *Lawlor* v. *Henderson* (4) the testator's property was to be divided amongst his relations as his executors should think fit and most worthy to receive it, and it was held by Sir Edward Sullivan to be a power of distribution. In *re Deakin* (5) is to the same effect. Stirling J. there followed *Pope* v. *Whitcombe* (3), and *Lawlor* v. *Henderson* (4). *Dunlop* v. *Greer* (6) is to the same effect.

The deceased nephew, R. L. Evans, did not take in default of appointment, as he did not survive the widow. This is not a case of children, as was *Lambert* v. *Thwaites* (7), but of relations, which are an exception to the rule. In Farwell on

(1) 4 Russ. 292.
(2) 1 Atk. 469.
(3) 3 Mer. 689.
(4) I. R. 10 Eq. 150.
(5) [1894] 3 Ch. 565.
(6) [1899] 1 I. R. 324.
(7) L. R. 2 Eq. 151.

Powers, p. 507, it is laid down that where a life interest is given by will to a party, with power to select the relations (that is to such as he shall appoint), it is firmly settled that in default of appointment the persons entitled are not the relations living at the testator's death, but those who are living at the death of the donee of the power, and the rule is the same if the power be one of distribution merely, and not of selection. The author cites *Finch* v. *Hollingsworth* (1), showing that otherwise "in many cases it might be impossible for the donee to exercise the power, for all the relations living at the testator's death might be dead at the decease of the donee of the power, and therefore there might be no one in whose favour an appointment could be made." See also Farwell at p. 475.

M. R. 1914. SHEEHY v. NUGENT.

Megaw in reply :—

All the cases where a power has been held to be a power of distribution were gifts to relations which would have created a non-exclusive power before Lord Selborne's Act. The word "such" occurred in *Harding* v. *Glyn* (2), and in *Grant* v. *Lynam* (3), and it occurs here.

O'CONNOR M.R. [having stated the facts as above, proceeded as follows :—] May 30.

A question then arises as to the destination of the property in default of appointment.

The first question, however, is concerned with the validity of the appointment to George Fitzgerald Sheehy. He is not a nephew of the testator, and therefore, to make him an object of the power, he must be brought within the class of relations. He is of course a relation, as that term is generally understood and used; but it has been argued that "relations" in the will of Hugh Murray Gun must be construed as "next-of-kin," according to a well-established rule of construction.

This rule is that where there is a power of appointment among relations which is not a power of selection, but only one

(1) 21 B. 112.
(2) 1 Atk. 469.
(3) 4 Russ. 292.

M. R. 1914. SHEEHY *v.* NUGENT.

of distribution, the objects of the power must be confined to the class falling within the limits of the Statute of Distributions: *Pope* v. *Whitcombe* (1); *Lawlor* v. *Henderson* (2); *Re Deakin* (3). If therefore the power vested in Julia Murray Gun was a mere power of distribution, George Fitzgerald Sheehy, not being a next-of-kin within the statute, was not an object of the power, and the appointment to him was invalid.

But was the power a mere power of distribution, and not of selection? The words of the will which created the power are: "To my wife in the first place and then after her death to my lawful nephews and nieces meaning such nephews and nieces and other relations as she deems fit and suitable." I agree with Mr. Megaw that these words may be read as if "my lawful nephews and nieces" in the earlier part of the sentence were struck out, and the gift was simply in the words "to such of my nephews, nieces, and other relations as she deems fit and suitable." This seems to me to give a power of selection—a power to select such as she deemed fit and suitable, which involved a power to exclude the unfit and unsuitable. If this is right, it follows that "relations" are not to be confined to such as are next-of-kin, and include a grandnephew. I therefore hold that the appointment to George Fitzgerald Sheehy was a valid appointment.

I have next to consider who are the persons making up the class to take in default of appointment. In the first place, nephews and nieces, and in addition "other relations." Are the relations who take in default of appointment next-of-kin only, or do they include relations who are not next-of-kin?

The gift in default of appointment in the present case is implied from the gift according to appointment, and in such case the class to take in default of appointment ought naturally to be the same class as that comprising the objects of the power. From this it would follow that all relations, whether next-of-kin or not, should in the present case take in default of appointment. But on the authorities this is not so. In *Wilson* v. *Duguid* (4), at page 251, Chitty J. says:—"The cases on relations are very

(1) 3 Mer. 689.
(2) I. R. 10 Eq. 150.
(3) [1894] 3 Ch. 565.
(4) 24 Ch. D. 244.

peculiar. It is now established that where there is power to appoint among relations so as to give the donee of the power the right of selection, the donee of the power can appoint to any relations, but in modelling the trusts to be applied in default, or arising from the power being coupled with the duty, the Court has found itself under the necessity of confining the class of relations to a particular set of relations, and has adopted the rule that relations who take in default of the exercise of the power in that case are those who are next-of-kin according to the statute." It appears, therefore, that the class to take in default is not the same class as that comprising the objects of the power, and I am bound by authority to hold that it is only the nephews and nieces, and other next-of-kin, if any, who in the present case take in default of appointment.

There is a further question for decision, viz., at what period of time is the class to be ascertained? Is it at the death of the testator or at the death of the widow? Mr. Gibson, who appeared as counsel for the personal representatives of a nephew who died in the lifetime of the testator's widow, contended that the class to take in default of appointment should be ascertained at the testator's death. His argument was, that the will of Hugh Murray Gun gave to his nephews, nieces, and relations, vested estates, liable to be divested by an appointment by his widow. If this is the proper construction to be placed on the will, then the members of the class must be ascertained at his death, because it was at this time the estates vested

After a perusal of the authorities cited by Mr. Gibson, I am of opinion that his construction is right. I see no material difference between this case and *Lambert* v. *Thwaites* (1). There, certain freehold property was conveyed to trustees upon trust to pay the rents to a husband and wife for their lives, and after the death of the survivor upon trust to sell and divide the proceeds amongst all and every the children of the husband, and in such shares and proportions as he should by will appoint. There was no express gift in default of appointment. No appointment was made, and it was held that all the children took vested shares,

(1) L. R. 2 Eq. 151.

M. R. 1914.

SHEEHY v. NUGENT.

both those who survived the husband, and one who died before him. Kindersley V.-C. laid down the following general principle: "If the instrument itself gives the property to a class, but gives a power to A to appoint in what shares and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of the class, and they will all take in default of appointment; but if the instrument does not contain a gift of the property to any class, but only a power to A to give it, as he may think fit, among the members of that class, those only can take in default of appointment who might have taken under an exercise of the power. In that case the Court implies an intention to give the property in default of appointment to those only to whom the donee of the power might give it."

In the present case there is a direct gift to the nephews, nieces, and relations of the testator subject to the appointment of his widow, and therefore I think the members of the class took immediate vested interests. In *Wilson* v. *Duguid* (1) a leasehold house was settled upon A for life, and after her decease upon B, her husband, for life, and after the decease of the survivor upon trust to assign the premises unto and amongst such of the children of A and B then living as they or the survivors should appoint, and in case there should be no such child or children, then upon trust for C for life, and after his decease upon trust to assign the said premises unto and amongst such of his children, and in such manner, shares, times, and proportions, as he should by any writing appoint. There was no issue of A and B. C died without having exercised the power of appointment vested in him. He had ten children. Three died before him; two after, and before the death of A; and one after the death of A and before the death of B. It was held that all the children took in default of appointment.

Now, that is a decision in a case like the present, the only noticeable difference being that here the class is composed of nephews, nieces, and relations. I cannot see why the same principle should not be applied to a class so composed. The

(1) 24 Ch D. 244.

class is easily ascertained—nephews, nieces, and next-of-kin—relations being confined to such as are next-of-kin. No doubt Chitty J. in his judgment said that the cases on relations were very peculiar. I have already read the passage in which he commented on such cases. His observations were in answer to counsel who, when contending that the class was to be ascertained on the death of the tenant for life, relied upon *Attorney-General* v. *Doyley* (1), *Pope* v. *Whitcombe* (2), and *Harding* v. *Glyn* (3). These were cases where the objects of the power were relations, and hence the observations of Chitty J. on cases on relations. But he said further: "I do not consider that I am called upon to say whether I should or should not follow the case of *Attorney-General* v. *Doyley* (1). The case is shortly reported, and it is enough to say that it is a case on relations, and that in deciding the case the Master of the Rolls considered that there could be 'no representation of those relations who died in his lifetime,' and he held that as to the personal estate there could be no representation of those relations who died in the niece's lifetime, for before her death no part thereof vested in any of the relations, and it was contingent whether they would be entitled thereto or not. I say it is not necessary for me to say whether I should or should not follow that case, or whether it would be followed in the present day." Evidently, then, Chitty J. had no great opinion of it as a binding authority. *Harding* v. *Glyn* (3) was also a case on relations; but in that case the will did not contain a gift to the class, but only a power to the tenant for life to give it, so that no vested interests were given to the objects of the power. *Dunlop* v. *Greer* (4) was a case in which a power of appointment among the testator's blood relations was given to the survivor of two tenants for life. Sir A. M. Porter M.R. held that the relations (next-of-kin) who took in default of appointment were to be ascertained at the death of the tenant for life. But there again there was no gift by the will to the relations, and the gift was to be implied from the power to give. On principle, therefore, and on authority I hold that the nephews, nieces, and other next-of-

(1) 2 Eq. Ca. Ab. 195.
(2) 3 Mer. 689.
(3) 1 Atk. 469.
(4) [1899] 1 I. R. 324.

M. R. 1914.

SHEEHY v. NUGENT.

kin, if any, of Hugh Murray Gun who were alive at his death took as in default of appointment.

Solicitors for the plaintiff: *William Leahy & Son.*

Solicitor for the defendant Jane Nugent: *James Harte.*

Solicitor for the defendant G. F. Sheehy: *Galway & M'Ilwaine.*

Solicitor for the defendants John R. Dewar and J. C. Hackett: *John F. Williams.*

W. L.

In re CROTHERS' TRUSTS.

Barton J.
1914.
Dec. 18, 21.

Will—Construction—Gift of Income of Fund to Widow until Re-marriage—Gift of the Fund on her Death—Re-marriage of Widow—Acceleration.

A testator directed his executors to pay to his wife the income of a fund of £1000 so long as she remained unmarried, and, on her re-marriage, to pay her £300 out of the fund. On the widow's death he directed "the money funded for her use" to be divided among the eldest sons of the testator's brother and sisters "then living," and mentioned in the will. The widow re-married.

Held, that, upon the determination of the widow's interest in the fund by her re-marriage, there was an acceleration of the subsequent interests, and also an acceleration of the time of ascertainment of the class of donees.

In re Johnson, 68 L. T. 20, applied.

Motion and Summons.

William Crothers of Rathfriland made his last will, dated the 5th October, 1842, as follows: "I consider I may be worth about £3000. Out of this sum, or whatever sum my executors may find I am worth, I desire and order that they do vest, either in mortgage or otherwise, for the use of my wife, one thousand pounds, the interest of which she is to receive so long as she remains unmarried, but no longer. On her marriage she is to receive £300. The remainder of my chattel property of every description, save the furniture of my own bedroom and drawing-room, which I leave to my wife, I desire and order may be equally divided between my brother Moses and my sisters Nancy, Susanna, Margaret, Mary Anne, and Jane Wallace. The small property I hold in Newry Street in perpetuity I leave to my father John Crothers. I desire that before the money is divided between my brother and sisters, and after the £1000 is funded for the purpose mentioned, £10 be paid to each of my executors to purchase a mourning ring. On the death of my wife, the money funded for her use is to be divided, share and share alike, between the eldest sons of my brother and sisters then living and mentioned in this will." The will proceeded to appoint executors, but did

Barton J. 1914.

In re CROTHERS' TRUSTS.

not make any provision for the distribution of the balance of the sum of £1000, after deducting therefrom the sum of £300 in the event of the marriage of testator's wife, or for the distribution of the income of such balance in the interval between the marriage of his wife and her death.

The testator died some time after the execution of his will, and on the 3rd March, 1846, probate of his will was granted to his executors.

The sum of £1000 was invested by the executors in accordance with the provisions of the will, and the interest was paid to Margaret Crothers, the testator's widow, down to the date of her marriage to Samuel Edgar, on the 3rd July, 1855. On the occasion of her marriage with Samuel Edgar, the executors paid her the sum of £300, portion of the sum of £1000, as directed by the will, and thereafter, for many years, paid to the testator's brother and sisters the income of the £700. Mrs. Edgar died on the 11th May, 1911.

The executrix of the surviving executor paid into Court, in 1898, the cash and securities representing the sum of £700.

William John Andrews, the eldest son of a sister of the testator who died in 1902, brought the present motion for an order to pay out the proceeds on the basis that upon the true construction of the will, and in the events which had happened, the proceeds of the sum of £700 passed upon the re-marriage of the testator's widow to the eldest sons then living of his brother and sisters mentioned in the will, in equal shares.

William Crothers Mitchell, the son of another sister of the testator who died in 1913, had taken out a summons for an order paying the proceeds to him as being the eldest son of the only one of testator's brothers and sisters living at the date of the testator's wife's death.

C. Murphy, for William John Andrews:—

Where a testator creates a life estate followed by a period of distribution, and subsequently creates a forfeiture or lapse in the event of re-marriage, or the law declares a forfeiture, the period

of distribution is accelerated and the class is ascertained as of the earlier date: Perkins, Conveyancing, pars. 566, 567. Acceleration occurs—(i) where the testator revokes the earlier devise: *In re Whitehorne*, *Whitehorne* v. *Best* (1); *In re Johnson* (2); *Lainson* v. *Lainson* (3); *Eavestaff* v. *Austin* (4); *In re Love* (5). (ii) in cases of forfeiture: *Craven* v. *Brady* (6). (iii) Where the earlier gift is void owing to the devisee or legatee being an attesting witness to the will: *Jull* v. *Jacobs* (7); *In re Clark* (8).

S. L. Brown K.C., and *Cusack*, for William Crothers Mitchell:—

The words of the will are clear. "On the death" means "on the death." "Then living" means living at the death of the wife. There can be no acceleration, because the members of the class cannot be ascertained till the death of the wife: *In re Tredwell* (9).

Ellison, for Bella Wallace, who had been appointed by the Court to represent the next-of-kin of the brothers and sisters of the testator mentioned in his will.

C. Murphy, in reply:—

In re Tredwell (9) merely decides that certain legacies are to be paid out of the *corpus*, and are not to be paid till the death of the tenant for life. The words "then living" occur in *In re Johnson* (2). The words in the will "the money funded for her use" show that once the use determined, the period of distribution was fixed.

Cur. adv. vult.

Dec. 21.

BARTON J.:—

This summons is concerned with the construction of the will, dated October 5, 1842, of William Crothers, and raises a nice question of acceleration. The will recited that the testator might be worth about £3000, and proceeded: "Out of this sum,

(1) [1906] 2 Ch. 121.
(2) 68 L. T. 20.
(3) 18 Beav. 1.
(4) 19 Beav. 591.
(5) 47 L. J. Ch. 783.
(6) L. R. 4 Eq. 209, 4 Ch. 296.
(7) 3 Ch. D. 703.
(8) 31 Ch. D. 72.
(9) [1891] 2 Ch. 640.

Barton J. 1914. *In re* CROTHERS' TRUSTS.

or whatever sum my executors may find I am worth, I desire and order that they do vest, either in mortgage or otherwise, for the use of my wife, one thousand pounds, the interest of which she is to receive so long as she may remain unmarried, but no longer. On her marriage she is to receive £300. The remainder of my chattel property of every description, save the furniture of my own bed-room and drawing-room, which I leave to my wife, I desire and order may be equally divided between my brother Moses and my sisters Nancy, Susanna, Margaret, Mary Anne, and Jane Wallace . . . I desire that before the money is divided between my brother and sisters, and after the £1000 is funded for the purpose mentioned, £10 be paid to each of my executors to purchase a mourning ring. On the death of my wife, the money funded for her use is to be divided, share and share alike, between the eldest sons of my brother and sisters then living and mentioned in this will."

Mr. C. Murphy argued in the first instance that the words "then living" should be transposed so as to mean "the eldest sons then living"; but, as the words "then living" are linked with the words "and mentioned in this will," and as there is no other mention in the will of eldest sons, such a construction would do violence to the testator's language.

Mr. Murphy next contended that, as regards the £700, which was let loose by the re-marriage of the widow, there was an acceleration of the interest of the eldest sons; and that the eldest sons of the brother and sisters, living at that date and mentioned in the will, became entitled to the £700. He relied upon a line of well-known cases of acceleration, of which the most recent is *In re Whitehorne* (1). As a general rule all interests which fail or are undisposed of by a will are captured by a general residuary gift, unless the testator otherwise provides. But a testator is presumed to have intended an acceleration of subsequent interests, where a life interest or other particular interest fails in consequence of the donee being prevented by law from taking. A forfeiture is an example of such a failure. In the present case the presumption is aided by the words: "On the death of my wife, the

(1) [1906] 2 Ch. 121.

money funded for her use is to be divided." On the widow's re-marriage the £700 ceased to be "funded for her use"; and I infer that the testator contemplated the division of the money when it ceased to be "funded," although he did not mention the event of forfeiture on re-marriage. Accordingly, I am of opinion that the context of this will supports the presumption in favour of acceleration.

It was argued, on behalf of W. C. Mitchell, that there could be no acceleration, because the words "then living" postpone the ascertainment of the class of donee until the death of the widow. But I am of opinion that, as in *In re Johnson* (1), the time of ascertainment is, upon the language of this will, also accelerated.

For these reasons I am of opinion that the re-marriage of the widow worked an acceleration of the interests which are limited to take effect upon her death.

Solicitor for William John Andrews: *T. B. Wallace.*
Solicitors for William Crothers Mitchell: *R. A. Mullan & Son.*
Solicitor for Bella Wallace: *Theodore Cronhelm.*

D. M. S.

(1) 68 L. T. 20.

Barton J.
1915.

Feb. 22.
Mar. 3.

In re BEST & BEST.

Costs—Solicitor and Client—Same Solicitor acting for both Vendor and Purchaser—Right to full Scale Fee—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order*, 1884, *Schedule I, Part* 1, *Schedule II.*

Solicitors, acting for a vendor of lands sold by public auction, subsequently acted for the purchaser also. The sale having been completed, they served the purchaser with a bill of costs in which they charged him with the scale fee provided by Schedule I, Part 1, of the General Order, 1884, under the Solicitors' Remuneration Act, 1881. Objections to the bill of costs were lodged by the purchaser, on the ground that the solicitors "could not properly and necessarily, and having regard to their duty as solicitors for both vendor and purchaser, perform all the work prescribed by Schedule I, Part 1, so as to entitle them to the scale remuneration." The taxing master disallowed the objections, finding that "the solicitors for the purchaser did all the work required under the schedule on his behalf." On a summons to review:

Held, that, in view of the taxing master's finding of fact, no sufficient grounds had been shown for reviewing his decision.

Summons by James Wilson, for an order that his objections dated the 15th December, 1914, to the taxation of the costs in this matter under the requisition to tax dated the 18th November, 1914, might be allowed, and that it be referred back to the taxing master to vary his certificate.

Messrs. Best & Best acted as solicitors for the vendor in a sale by public auction of three farms of land, held by the vendor at judicial rents. At the auction, Mr. Robert Thompson purchased on behalf of Mr. James Wilson at the sum of £1095. Subsequent to the sale, Mr. Wilson instructed Messrs. Best & Best to act for him and complete the sale. The sale having been completed, Messrs. Best & Best, on the 21st May, 1914, sent Mr. Wilson the documents of title and a bill of costs amounting to £35 15*s.* The first item in the bill of costs was the following: "Solicitor's fee under the Remuneration Act for all costs in connection with purchase of lands in Drumnahuncheon and Drumard, including perusal of contract, investigating title and

searches, and preparing and completing assignment and having same noted with the Land Commission (but exclusive of outlay) . . . . . Consideration money £1095 . . . . . £21 10*s.*"

The remainder of the bill consisted of "Stamp on assignment," £11, "Registration fee," £0 11*s.* 6*d.*, and some small undisputed items.

Some correspondence followed, in which Mr. Wilson raised the point that Messrs. Best & Best, having acted for both vendor and purchaser, were entitled to charge only one-half of the scale under the Solicitors' Remuneration Act, 1881. Messrs. Best & Best then informed Wilson that they would have the costs taxed, and that they withdrew the above bill of costs.

The bill of costs submitted to and taxed by the taxing master amounted to £38 19*s.* 3*d.*, commencing with the above scale fee of £21 10*s.*, and adding to the former bill, among other items, the sum of £2 2*s.*, approval fee. The taxing master taxed the bill at £36 17*s.* 3*d.*, disallowing the approval fee, but allowing the scale fee and the other items. Mr. Wilson lodged the following objections to the taxing master's taxation: "Mr. James Wilson objects to the allowance by the taxing master of the statutory scale fee of £21 10*s*, under part 1, schedule 1, of the General Order under the Solicitors' Remuneration Act, on the following grounds, viz.:—

"Messrs. Best & Best were solicitors for the vendor in the sale of property by public auction under particulars and conditions of sale prepared by them.

"Mr. Wilson was the purchaser at the auction at the sum of £1095. He employed Messrs. Best & Best to act for him in completing the purchase.

"Under these circumstances Messrs. Best & Best could not properly and necessarily, and having regard to their duty as solicitors for both vendor and purchaser, perform all the work prescribed by Part 1 of Schedule I so as to entitle them to the scale remuneration claimed.

"The solicitors prepared the particulars and conditions of sale for the purposes of the auction. It cannot be proper and necessary work to go through the form of perusing a document drawn up by themselves.

Barton J.
1915.
In re BEST & BEST.

"The solicitors, in duty to their vendor client, must have fully investigated his title; and, whether they did so or not, a full and complete knowledge must be attributed to them (and through them to their purchaser client), not only of what they did know of the title, but of what they ought to have known. It cannot therefore be proper and necessary work to go through the form of investigating the title on behalf of the purchaser.

"The conditions of sale limit the searches to a hand search at vendor's expense, that is to say a search made by the solicitors themselves and not by an officer of the Registry of Deeds office. The performance of this work as vendor's solicitors renders unnecessary any investigating of the same search as solicitors for the purchaser.

"The only necessary and proper work done by the solicitors acting for the purchaser consisted of the preparation, completion, and registration of the purchaser's conveyance; and even this work was considerably lessened by reason of the solicitor acting for vendor and purchaser.

"Take notice that James Wilson requires the taxing master to review his decision in respect of the said item."

On review the taxing master made the following order: "I have allowed the fee under schedule 1 of the Solicitors' Remuneration Act. In this case I find that the solicitors for the purchaser did all the work required under the schedule on his behalf, and this being the case I have no option, in my opinion, except to tax the costs as I have done. I disallow the objection."

James Henry, solicitor for the purchaser:—

The objections lodged by the purchaser contain the grounds on which the purchaser objects to the scale fee being allowed. A solicitor in order to earn the scale fee must do all the work prescribed: *In re Lacy & Son* (1); *Ex parte Ferguson & Co. to M. Buckley* (2); *In re Romain* (3); *In re Baillie & Co.* (4).

(1) 25 Ch. D. 301.
(2) 21 L. R. Ir. 392.
(3) [1903] 1 Ch. 702.
(4) 15 T. L. R. 277.

Best K.C., for Messrs. Best & Best:—

Barton J.
1915.

In re BEST & BEST.

Rule 3 in Schedule 1, Part 1, provides that where a solicitor acts for both mortgagor and mortgagee he is to be entitled to charge the mortgagee's solicitor's charges only; Rule 2 in Schedule 1, Part 2, contains a similar provision as to a solicitor acting for both lessor and lessee; but the rules contain no such provision with reference to a solicitor acting for both vendor and purchaser, and the maxim *expressio unius est exclusio alterius* applies. In the present case everything has been done to enable the scale fee to be charged, and the taxing master has so found: *Parker* v. *Blenkhorn* (1); *In re Read* (2). This being so, the solicitors are entitled to the full scale fee from the purchaser, notwithstanding that they also acted as solicitors for the vendor.

March 3.

BARTON J.:—

This is a summons on behalf of Mr. James Wilson, for an order that his objections to the taxation of the costs of his solicitors, Messrs. Best & Best, in the matter of the purchase by him of certain lands in the county Armagh, be allowed.

It appears that Messrs. Best & Best were solicitors for the vendor in the sale by auction of these lands, and Mr. James Wilson was declared purchaser at the auction at the sum of £1095. Mr. Wilson employed Messrs. Best & Best, who were already the vendor's solicitors, to act for him in completing the purchase.

The taxing master has allowed to Messrs. Best & Best the statutory scale fee of 40*s.* per £100, amounting to £21 10*s.*, under Schedule 1, Part 1, of the General Order, 1884, under the Solicitors' Remuneration Act, 1881. The purchaser objected to this allowance on the ground that "Messrs. Best & Best could not properly and necessarily, and having regard to their duty as solicitors for both vendor and purchaser, perform all the work prescribed by Part 1 of Schedule I so as to entitle them to the remuneration claimed." The work prescribed by Part 1 of Schedule I for a purchaser's solicitor expressly includes "perusal of contract or conditions of sale, investigating title and searches, and preparing, completing, and

(1) 14 A. C. 1. (2) [1894] 3 Ch. 238.

Barton J. 1915. *In re* Best & Best.

registering conveyance." It is settled that the scale fee cannot be allowed unless the work specified in the Schedule has in substance been done: *In re Lacey & Son* (1). It has been contended that Messrs. Best & Best, having prepared the particulars and conditions of sale, and having deduced title, and having furnished necessary searches on behalf of the vendor, could not properly and necessarily peruse the documents which they had prepared, and investigate the title and searches, on behalf of the purchaser.

The taxing master has disallowed this objection in the following terms:—"I have allowed the fee under Schedule I of the Solicitors' Remuneration Act. In this case I find that the solicitors for the purchaser did all the work required under the Schedule on his behalf, and this being the case I have no option, in my opinion, except to tax the costs as I have done."

"The taxing master," said Lord Langdale in *Alsop* v. *Lord Oxford* (2), "is the sole judge of the fact whether the business has been done." Unless he has made some mistake in principle, his finding is conclusive. I cannot accept the suggestion that he has found as a fact what is in the nature of things impossible. Assuming that his finding is correct, the allowance does not contravene any of the provisions of the General Order. The General Order expressly provides for the remuneration of a solicitor, when he is acting for both mortgagor and mortgagee, or for both vendor and purchaser in the case of a conveyance at a rent, or for both lessor and lessee. But it does not expressly provide for the case of a solicitor acting for both vendor and purchaser in an ordinary transaction like the present one.

Under these circumstances, and in view of the taxing master's very definite finding of fact, I see no sufficient grounds for reviewing his decision.

Solicitors for the purchaser at the taxation: *Henry & Son.*
Solicitors for Messrs. Best & Best: *In person.*

D. M. S.

(1) 25 Ch. D. 301. (2) 1 M. & K. 564.

In re DONALDSON.

WATSON *v.* DONALDSON.

(1914. No. 157.)

M. R.
1914.
March 3.
April 17.
Appeal.
June 12, 15.

Will—Construction—Gift of Residue in Equal Shares to Named Persons surviving Tenant for Life—Effect of Revocation of Shares of one or more —Gift to a Class.

A testator bequeathed the residue of his property to trustees upon trust for his sister for life, and upon her death in trust for five persons or such of them as should be alive at the death of the survivor of his sister and himself, in equal shares.

By a codicil the testator revoked the gift to two of the five legatees. All five survived the testator and his sister.

Held, by the Court of Appeal, affirming the decision of the Master of the Rolls, that the effect of the revocation was to augment the shares of the other legatees.

Adjourned Summons.

The following statement is taken from the judgment of the Master of the Rolls :—

"The question for decision in this case arises out of the revocation, by a codicil, of gifts made by a will to two out of several residuary devisees and legatees. It is contended, on the one hand, that the revocation produced an intestacy as to two shares of the residuary estate, while, on the other hand, it is contended that the effect was to augment the shares of the other residuary legatees and devisees. We are all familiar with questions of this character, but the circumstances of the present case make the application of the ordinary principles of construction somewhat difficult, if at all applicable.

"By his will dated the 9th December, 1911, Robert Donaldson bequeathed, *inter alia*, the sum of £300 to his servant John Conroy, and £100 to his wife Margaret Conroy, and devised and bequeathed all the residue of his real and personal estate to trustees upon trust for sale, and directed his trustees to pay out of the

M. R. 1914.

WATSON v. DONALDSON.

proceeds his funeral and testamentary expenses and legacies, and to invest the residue and pay the income of the investments to his sister Anne Orr Donaldson during her life, and upon her death to hold the residue upon trust for James Donaldson, Isabella Lyttle, Ellen Jordan, John Conroy, and Margaret Conroy (above-mentioned), or such of them as should be alive at the death of the survivor of his, the testator's, said sister and himself, in equal shares absolutely.

"By a codicil dated the 3rd August, 1912, the testator revoked the bequests in his will to John Conroy and his wife Margaret Conroy, and in lieu thereof he bequeathed to John Conroy the sum of £300 absolutely.

"The testator's sister survived him and died in October, 1913, All the residuary legatees survived her.

"On a previous occasion the question was raised whether the codicil revoked the residuary devise and bequest to John Conroy and Margaret Conroy. I decided that it did; and the case now proceeds on the basis that the codicil had that effect."

Megaw, for the trustees of the will.

Herbert Wilson K.C., for Ellen Jordan, one of the residuary legatees:—

It is admitted that this is a tenancy in common, and that in such case if the share of one of several named persons, not being a class, lapses or is revoked, there is an intestacy as to that share. But the rule is different if the gift is to a class; in such case the shares of the others are augmented. I submit that this is a gift to a class. If a contingency is attached to a gift to named persons, the gift may become a gift to a class. "A gift to several named persons is not a gift to a class, unless a contingency is added, as when the gift is to A, B, C, and D, if living": Jarman on Wills, 6th ed., p. 432. Here a contingency is added, namely, that of surviving the testator and his sister, so there is a gift to a class, and the members of it cannot be ascertained till the death of the survivor of the testator and his sister. She survived him. In *M'Kay* v. *M'Kay* (1) there was

(1) [1900] 1 I. R. 213.

a gift of the proceeds of the sale of goods and chattels to the testator's wife and children, if living at the time of sale, in equal shares. Chatterton V.-C. there says, at p. 218: "The legal definition of a gift to a class depends on the mode of the gift, which must be a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in certain proportions, the share of each being dependent upon the ultimate number of persons." That definition accords with the statement in Jarman, which I have quoted. The gift in that case was, in language, to a class, "to my wife, and all my children then living," but that was not the ground of the decision. *In re Hornby* (1), and *In re Spiller*, *Spiller* v. *Madge* (2), are cited in Jarman in support of the proposition. In *In re Hornby* (1) there was a gift of residue to B, C, and D, and A, if living. A was dead at the date of the will. Wood V.-C. held that the gift to A had not lapsed, but was contingent upon his being alive, and that the other residuary legatees, and not the next-of-kin, took the share to which he would have been entitled. In *In re Spiller* (2), the residue was given equally between named persons, and such of the children of J. D. as were living at the date of the will. J. D. had died before the date of the will, and had left no children. Fry J., following *In re Hornby* (1), held that there was no lapse of the share given to the children of J D., but that the whole residue was divisible among the persons named. Here the residue is given to named persons living at the death of the survivor of the testator and his sister. The gifts to two of the named persons were revoked, and the other three take the whole between them.

S. L. Brown K.C. (with him *Baxter*), for James Donaldson, the sole next-of-kin, as well as a residuary legatee:—

M'Kay v. *M'Kay* (3) was the case of a gift to a class, no particular persons being named; it was to the testator's wife and all his children then living. Here the gift is to five named

(1) 7 W. R. 729.
(2) 18 Ch. D. 614.
(3) [1900] 1 I. R. 213.

M. R. 1914.

WATSON v. DONALDSON.

persons in equal shares, *i.e.* each is to get one-fifth if they all survive the testator and his sister. They all survived, but two were cut out by a codicil. The Court held on a previous occasion that the codicil revoked the residuary bequests to John and Margaret Conroy, as well as the pecuniary legacies given to them by the will. The definition of a class given by Chatterton V.-C. in *M'Kay* v. *M'Kay* (1) was only a dictum, and not necessary for his decision. There is no case in which a gift to named persons has been held to be a gift to a class. By striking out two names you do not, according to the decisions, increase the shares of the other three. If it was a gift to the five named persons without a contingency, the case would be unarguable. In *Shaw* v. *M'Mahon* (2) the residue was to be divided equally among all the testator's children living at his death, including his sons Beresford and William John. Then in a codicil the testator revoked the gift to his son William John. Sir Edward Sugden held that the gift was a gift to a class, and that William John being excluded by the codicil the whole went to the other residuary legatees. Sir Edward Sugden there says that *Cresswell* v. *Cheslyn* (3) was well decided; but there the gift was to the three children expressly as tenants in common and *nominatim*. No doubt the fact that one of the objects is named does not prevent it being a gift to a class, as in *Shaw* v. *M'Mahon* (2). In *Sykes* v. *Sykes* (4) Lord Cairns says that *Cresswell* v. *Cheslyn* (3) decided, if a decision was necessary, that if there is a devise or bequest of residue to a number of persons *nominatim* as tenants in common, and then a revocation of the devise or bequest of one of the shares, that share does not fall into the residue, but becomes undisposed of and goes to the next-of-kin, or heir-at-law. The testator here has reduced the residuary bequest by two-fifths, and the case falls within the rule stated in *Sykes* v. *Sykes* (4). [He also referred to *In re Bentley*; *Podmore* v. *Smith* (5).]

(1) [1900] 1 I. R. 213.
(2) 4 Dr. & War. 431.
(3) 2 Eden 123; 3 Bro. P. C. 246, Toml. ed.
(4) L.R. 3 Ch. 303.
(5) [1914] W. N. 88; 110 L. T. 623.

James Andrews, for Isabella Lyttle:—

The effect of the codicil was to leave intact the entire of the property included in the residuary bequest in the will, with the names of John Conroy and Margaret Conroy omitted. There is no canon of construction to compel the Court to hold that there is an intestacy as to the share of the Conroys. The testator intended to draw his pen through the name of the Conroys and give the residue to the other three persons. In Jarman on Wills, 6th ed., p. 437, the editor says: "It has been already mentioned that a gift to such of a number of named persons as are living at a particular time, or survive the testator, is equivalent to a gift to a class, so far as the question of lapse is concerned." The editor in the note refers to *In re Spiller* (1), and *Re Featherstone's Trusts* (2), and to p. 430 supra, which is the passage he refers to in the text: "Again, property can be given to a number of persons *nominatim*, as tenants in common, subject to a condition that they shall be living at a given time; and if any of them are not living at that time, the others take the whole. In *Sanders* v. *Ashford* (3) the time was the testator's death; in *In Re Hornby* (4) the time was the date of the will. A gift of this description is really a gift to a class."

In *Clarke* v. *Clemmans* (5) a testator bequeathed residue in trust for Daniel Price Clemmans (his brother), Martha Eastwood (his sister), and James Clemmans (who was known to the testator to be dead, as appeared from a prior bequest in the will to the widow of his brother the late James Clemmans), and the eight children of David Johnston (the testator's nephews), in equal shares as tenants in common, the shares of the children to vest only at twenty-one. Malins V.-C. held that there was no intestacy as to James Clemmans' share. He held that when a testator names several objects of bounty, who are clearly intended to take an entire fund between them, but one of them is incapable, and known by the testator to be so at the time of making his

(1) 18 Ch. D. 614.
(2) 22 Ch. D. 111.
(3) 28 B. 609.
(4) 7 W. R. 729.
(5) 36 L. J. Ch. 171.

M. R. 1914.

WATSON *v.* DONALDSON.

will, those of the donees who are capable will take all. *Sanders* v. *Ashford* (1) bears out this view. The devise there was to five named persons in fee, to be equally divided between them, if more than one, as tenants in common. If more than one, meant if more than one survived him. One died in the testator's lifetime. It was held that there was no lapse, but that the four survivors took equally. There was no vested interest here till the persons named survived the tenant for life.

The argument for the next-of-kin amounts to this, that there was an absolute gift to James and Margaret Conroy, which was revoked. But here the legatees are made as it were joint tenants, because the element of survivorship is introduced. [O'CONNOR M.R.: Can you make them a class, when they have nothing in common between them? *Kingsbury* v. *Walters* (2).] The testator might make them a class though they had nothing in common, as in *Clarke* v. *Clemmans* (3). Suppose the Conroys had died before the tenant for life, they would have taken nothing. The next-of-kin want to stand in a better position than the Conroys. [*Brown K.C.*: *Clarke* v. *Clemmans* (3) was decided on the ground that James Clemmans was incapable of taking. *Sanders* v. *Ashford* (1) is bad law.] In Jarman on Wills, p. 430, *Sanders* v. *Ashford* (1) is treated as good law.

Cur. adv. vult.

April 17.

O'CONNOR M.R., having stated the facts as above, proceeded as follows:—

There are two rules of construction which are well established. If residuary devisees or legatees are made tenants in common of the residue, a simple revocation of the share or shares of one or more of them, or a lapse of such share or shares by death during the testator's life, creates an intestacy as to such share or shares. Again, if a gift of residue is in favour of a number of persons as a class, the inability of one or more of them to take, whether by death in the testator's lifetime or by revocation, does not cause a lapse, but augments the shares of the remaining members of the class.

(1) 28 B. 609.
(2) [1901] A. C. 187.
(3) 36 L. J. Ch. 171.

The present case does not appear to me to come within either of these rules. The residuary devisees and legatees, though tenants in common, are only so contingently on a certain event happening, viz., their being the survivors of the testator's sister who survived him. Neither can they properly be described as a class. They are named persons, not coming within any common description. No doubt each of them taking under the residuary gift should survive the tenant for life, but this common contingency affecting the gift to each did not make them a class.

There is one other rule of law which I think may be called in aid of the solution of the question which has arisen. Just as it is settled law that the revocation of the gift to one of several tenants in common creates an intestacy in the absence of a further disposal of the share of such one, so it is equally well settled that the revocation of the gift to one of several joint tenants does not create an intestacy, but augments the shares of the other joint tenants. The reason for the distinction is to be found, if not exclusively, at least principally, in the *jus accrescendi*, which is the great characteristic of joint tenancy. Now in the present case, although the residuary clause does not create a joint tenancy, it does, during the life of the testator's sister, create a right by survivorship, and so far confers on the residuary gift this characteristic of a joint tenancy. This, to my mind, gives a reason for the extension of the rule I have mentioned, which governs residuary gifts creating a joint tenancy, to a case like the present, where the residuary legatees, though not joint tenants, had under the will at the death of the testator the right of survivorship *inter se*, so long as the prior estate for life should last. On this ground alone I would be prepared to hold that there was no intestacy, and that the shares of the residuary legatees whose gifts were not revoked were augmented. But I can find a more satisfactory reason for this conclusion. The testator, by revoking the gifts in the will to John Conroy and his wife, certainly did not intend to detract in any way from the gifts to the other residuary legatees. These gifts embraced the right by survivorship to the entire residuary estate, and if I held that there was an intestacy as to two-fifth shares, this right would only have extended over the remaining three-fifth shares.

M. R. 1914. WATSON v. DONALDSON.

I was referred by Mr. Brown to a case of *In re Bentley, Podmore* v. *Smith* (1), where there was a residuary bequest to all the testatrix's nephews and nieces (afterwards named) who being nephews should have attained twenty-one, or being nieces should have attained twenty-one or married. All attained twenty-one, and three predeceased the testatrix. Joyce J. decided that there was an intestacy as to the share of these three, holding that the gift was not made to the nephews and nieces as a class. There was no doubt under the terms of the will a right of survivorship in the event of any of the residuary legatees dying under twenty-one; but at the death of the testatrix all had attained twenty-one, so that no right of survivorship accrued under the will. This distinguishes it from the present case.

W. L.

June 12, 15.

The defendant James Donaldson appealed (1).

S. L. Brown K.C. and *Baxter* for the appellant.

R. F. Harrison K.C. (with him *James Andrews*) for the defendant Isabella Lytle.

Herbert Wilson K.C., for the defendant Ellen Jordan.

The arguments were the same as in the Court below. The following additional cases were cited:—*Orford* v. *Orford* (2); *Harris* v. *Davis* (3); *Shrymsher* v. *Northcote* (4); *Ramsay* v. *Shelmerdine* (5).

O'BRIEN L.C.:—

This case comes before us on appeal from a judgment of the Master of the Rolls, with whose decision I may at the outset say

(1) In the Court of Appeal, before O'BRIEN L.C., CHERRY L.C.J., and HOLMES L.J.

(1) [1914] W. N. 88; 110 L. T. 623.

(2) [1903] 1 I. R. 121.

(3) 1 Coll. 416.

(4) 1 Swant. 566.

(5) L. R. 1 Eq. 129.

I concur. I consider that he was right in the construction of the will and codicil in question here, and, but for the fact that we were pressed with a very learned argument which suggested that the upholding of the construction of the Master of the Rolls would lead to a departure from fixed canons of construction, I should have been content to say that I agree with his decision.

The cases which were cited to support this contention are such that I think it is necessary I should express my opinion as to their effect.

There is no doubt that one at least of these cases—*Orford* v. *Orford* (1), decided by the late Vice-Chancellor—would, if taken literally, appear to be at variance with the decision of the Master of the Rolls; and as the opinion I have formed will have the effect of dissenting from any such proposition as is stated to have been laid down in *Orford* v. *Orford* (1), it is only right that I should review the authorities.

Two rules of construction applicable to wills, from which a Court is not entitled to depart, are involved in the present case. One is that which was laid down originally in the case of *Cresswell* v. *Cheslyn* (2), and subsequently approved in the House of Lords. In that case it was decided that where a testator gives the residue of his personal estate to his three children, share and share alike, as tenants in common, and by a codicil revokes the bequest to one of these children, the revoked third does not belong to the two other legatees, but must go according to the Statute of Distributions, in the absence of anything more in the will. That is a principle from which the Court cannot depart. Nor indeed is it, as stated in the terms used in *Cresswell* v. *Cheslyn* (2), a principle from which one could logically depart. There could be no logical distinction, having regard to the nature of the interest, between a bequest of that kind where property is given to A, B, C, and D, as tenants in common, with a revocation in a codicil of the gift to one of them, and a bequest of separate items of property to each of them, and a like revocation of the gift to one. The other principle is that if a bequest is to named persons as joint tenants the rule is different.

(1) [1903] 1 I. R. 121. (2) 2 Ed. 123.

Appeal. 1914. WATSON *v.* DONALDSON. O'Brien L.C.

The present case is not one of a tenancy in common *simpliciter*, nor is it a case of joint tenancy. The testator has used words which, in my judgment, differentiate it from *Cresswell* v. *Cheslyn* (1). *Cresswell* v. *Cheslyn* (1) really only decided a simple proposition, plus this, that a mere revocation by codicil of a bequest does not amount to a specific re-donation of the property in the will itself. *Cresswell* v. *Cheslyn* (1) seems to have been first referred to in *Shaw* v. *McMahon* (2), but this latter case does not help us in the present appeal, as it appears to me merely to confirm the proposition contained in *Cresswell* v. *Cheslyn* (1), though of course it also decided that the gift in that case was one to named persons as a class, and that exception would be sufficient to take the case out of the operation of the general doctrine.

Harris v. *Davis* (3), another case to which we were referred, also affirms the proposition in *Cresswell* v. *Cheslyn* (1), and the judgment contains a passage which to my mind is of some value in indicating how a Court ought to approach the construction of a will where, as in the present case, a canon of construction is said to be applicable. In that case there was no gift to named persons as a class, but the form of the bequest to one of the legatees, was:—"I do also bequeath unto Henry Moses, at present in America, one half of the legacy named to each of the other legatees (that is to say) one half of what his brother Moses Moses may receive." The testator subsequently by a codicil revoked the legacy to Henry Moses. Now, it was held that although, if there was nothing more, *Cresswell* v. *Cheslyn* (1) would apply, the gift not being to a class, yet that the effect of the codicil was simply to sponge out of the will the particular gift that was revoked by the codicil, and that there was then left on the face of the original will sufficient to enable the Court to decide that in fact the whole property bequeathed went to the first set of named individuals. The learned judge says:—"The provision for Henry Moses being considered as struck out of the will, everything is, on the face of the will, manifestly disposed of. This kind of question must, in

(1) 2 Ed. 123.
(2) 4 D. & War. 431.
(3) 1 Coll. 416.

each instance not concluded by authority, be a question of intention upon the particular instrument to be construed." It is interesting to find in a case as far back as 1844 a discussion upon the construction of a will which appeared at first reading to be ruled by this doctrine, but which, on closer examination, negatived it. This case shows that there is always the superior rule of good sense and law that one must first ascertain what was the intention of the testator, and secondly, where that intention has been expressed, then exclude a fixed narrow rule that might otherwise be applicable.

In that position of affairs, and for the moment untrammelled by any subsequent authorities, let me read the terms of the present will, and see if there really could be any doubt as to the intention of the testator. He gives his real and personal estate to trustees upon trust for sale, and directs that after payment of his funeral and testamentary expenses and legacies they shall invest the residue, and "shall hold said residue in trust to apply the rents, profits, dividends, and income thereof to suitably support my sister Anne Orr Donaldson during her life, and upon her death to hold the said residue in trust for the said James Donaldson, Isabella Lytle, Ellen Jordan, John Conroy, and Margaret Conroy, or such of them as shall be alive at the death of the survivor of my said sister and myself in equal shares absolutely." The people who are to take in common are to be ascertained on the death of the particular person named there—the survivor of the testator Robert Donaldson, and his sister Anne Orr Donaldson. You cannot tell who they will be until that event occurs; but if they all survive until the event, they all have the chance of taking the whole. Now, if any intention could be considered to be clear, or clearly expressed, it would appear to me that there is in the present case an intention clearly expressed that James Donaldson, Isabella Lytle, Ellen Jordan, John Conroy, and Margaret Conroy, if they survive Anne Orr Donaldson, have a chance of dividing all between them. The codicil simply revokes two bequests:—"I hereby revoke the bequests in my said will to John Conroy and his wife Margaret Conroy, and in lieu thereof I bequeath to the

Appeal. 1914. WATSON v. DONALDSON. O'Brien L.C.

said John Conroy the sum of three hundred pounds absolutely." If I be not absolutely bound by bonds that cannot be broken, I should have thought that there could be no doubt that, as the effect of the codicil is simply to wipe out the bequests to John and Margaret Conroy, and as there is still sufficient on the face of the will to show the intention of the testator, I would not be justified in destroying the chance of James Donaldson, Isabella Lytle, and Ellen Jordan of getting the residue of the estate, by the operation of a tenancy in common. To adopt the construction suggested here would be, it seems to me, to deprive them of what on the face of the will there is a clear intention to give them, and on the codicil no intention whatever to deprive them of.

Now, if that be the real and obvious meaning and true intention of the testator, I have next to consider whether I am compelled by authorities to decide that an intention not only obvious from the will, but to my mind clearly expressed in it, is not to be allowed to take effect.

I have dealt with the principle in *Cresswell* v. *Cheslyn* (1), and in my opinion it obviously does not apply either in terms or in substance to a case like the present. Other cases, however, have been cited, which are pressed as being coercive. *Sykes* v. *Sykes* (2) seems to me to be a somewhat clear case, not at all like the present, and falling within the rule in the words of Lord Cairns :—"If there is a devise or bequest of residue to a number of persons *nominatim* as tenants in common, and then a revocation of the devise or bequest of one of the shares, that share does not fall into residue, but becomes undisposed of and goes to the next-of-kin or heir-in-law." *Sykes* v. *Sykes* (2) was an application of that principle. From *Shrymsher* v. *Northcote* (3) we really get no help whatever. It merely decided that there was no difference in the cases of a residue and a specific sum given to persons as tenants in common.

The next case, however, *Ramsay* v. *Shelmerdine* (4), requires careful consideration, but when accurately considered it as little helps in the present case as does the case I have just referred to.

(1) 2 Ed. 123.
(2) L. R. 3 Ch. 301.
(3) 1 Swant. 566.
(4) L. R. 1 Eq. 129.

It also was a case where the residue was bequeathed upon trust "to divide the same into as many equal parts or shares as shall be equal in number to the number of my children living at my decease, or born in due time afterwards, or such of them as may happen to have died in my lifetime, leaving issue; and I give one of such shares to each of my sons who shall attain twenty-five or die in my lifetime leaving issue, and on trust to retain each of my daughter's shares to be settled to their separate use, the shares of those dying without issue to go to the survivors." By a codicil the testator revoked all and every provision in his will in favour of his daughter Ellen, or her issue in her own right, or in any other manner. It was held that the children did not take as a class, and that there was an intestacy as to Ellen's share. It is perfectly clear to me that the case went simply on this—that there was only a gift to each child of an aliquot part; that the dominant idea was that each child should take such share and no more, and that the issue of each child should take such share and no more, if the child predeceased the testator.

Now, with one exception, that concludes the authorities so far as it is suggested they are binding on the Court to reverse the decision of the Master of the Rolls. But there undoubtedly was, in 1903, a decision by the Vice-Chancellor in the case of *Orford* v. *Orford* (1) which, if you take the facts simply as stated in the report, would look like an authority in favour of the proposition argued here by MR. BROWN. That authority does not bind us; but if it were necessary for the decision of the present case, speaking with the greatest respect for the learned judge who decided it, I should be compelled, if it really was decided on the ground suggested, to dissent from it. If, however, you examine *M'Kay* v. *M'Kay* (2), and compare it with *Orford* v. *Orford* (1), it will be seen that the Vice-Chancellor did not allow his mind ever to enter upon this speculative question of whether there could be a class in either a technical or non-technical sense. He held in *M'Kay* v. *M'Kay* (2) that there was a class; in *Orford* v. *Orford* (1) he held simply that there was no class; that decided the case, and none of the counsel suggested

(1) [1903] 1 I. R. 121. (2) [1900] 1 I. R. 213.

Appeal. 1914. WATSON v. DONALDSON. O'Brien L.C.

anything to the contrary. The case was decided as if there were nothing else in it, and I cannot take it as a decision upon the other question, which was not argued. In any event the case is not binding on us.

I base my judgment on this ground, and on this ground only, namely, that while the proposition in *Cresswell* v. *Cheslyn* (1) is obviously one which is binding on us, and which must be applied by us in every case where the language of the will itself compels us to do so, still we must always see whether the language of the will itself is of such a nature that it negatives or must negative, as I think the will here does, the application of that particular canon of construction, as it is called. I conceive that there is no case which binds me to hold that the words which I find in the present will:—"or such of them as shall be living at the death of the survivor of my said sister and myself in equal shares absolutely," should be entirely disregarded, and no force given to their grammatical, logical, and as I think clear, effect. My decision accordingly will not, in any view of it, add anything to the learning upon this question of class or *quasi* class—class in the technical sense, or class in the popular sense of the word. It is simply a decision on the construction of this particular will, and no more.

HOLMES L.J.:—

It is well settled that if a testator gives his residuary property to certain named persons as tenants in common, and afterwards revokes by codicil the gifts thus given to one or more of them, such gifts must be treated as no longer included in the residue, unless a contrary intention can be inferred from the will. This was the decision in *Cresswell* v. *Cheslyn* (1), and was obviously arrived at by giving their well-known legal meaning to the words "tenants in common," there being nothing to show that the testator did not use them in their ordinary sense. As the result of acting on this rule is to create an intestacy, which was probably not contemplated when the codicil was executed, judges have been anxious to find something in the language used, or in the

(1) 2 Ed. 123.

character of the gifts, to show an intention that the portion of the residue of the original gift which had been revoked, or had failed by the death of the legatee, was to continue residue for the benefit of the other residuary legatees. A well-known evidence of this intention is when the residuary legatees form a class. If they come within this description, the rule of law is that although the residue is given to them as tenants in common, still, notwithstanding the death of one, or the revocation of the bequest to one, his share continues part of the residue. I presume the foundation of this rule is that the selection of a class of residuary legatees indicates an intention that all the residue will go amongst the class, even although it may be diminished by death or by the act of the testator.

In the will now under consideration, the gift in my opinion is not a gift to a class. Of the five legatees one is a relative, two are friends, and two servants; but I think that the testator indicates very clearly that if their number is diminished the whole of the residue is to go amongst the diminished number. The residuary property is given to the testator's sister during her life, and upon her death to five named persons, or such of them as shall be alive at the death of the survivor of the sister and the testator, in equal shares absolutely. Under this gift the persons to whom the residue shall go are not to be ascertained until the death of the survivor of the testator and his sister. The latter survived, and, from her brother's death, the tenure of the residuary legatees resembled that of joint tenants. If one of them had died in the interval, the residue thereafter would have included his or her share. Why would not the same result follow if the testator in his lifetime had revoked the gift to one of the residuary legatees? The Master of the Rolls is, in my opinion, right in his statement of the law that the revocation of a residuary gift to one of several joint tenants does not create an intestacy, but augments the share of the other joint tenants.

Being of opinion that the intention of the will under consideration was that, down to the death of the survivor of the testator and his sister, the residuary legatees should be regarded as taking jointly, I hold that the appeal ought to be dismissed.

Appeal. 1914.

WATSON *v.* DONALDSON.

O'BRIEN L.C. :—

The Lord Chief Justice has intimated his concurrence in our judgment.

Solicitors for plaintiffs: *Galway & M'Ilwaine.*

Solicitor for the defendant James Donaldson: *Robert T. Martin.*

Solicitors for the defendant Ellen Jordon: *Shean & Dickson.*

Solicitors for the defendant Isabella Lytle: *Carson & M'Dowell.*

J. M.

TIPPERARY CO. COUNCIL (NORTH RIDING) *v.* THE IRISH INSURANCE COMMISSIONERS.

M R.
1914.

Nov. 17, 18.
Dec. 3.

(193. No. 699.)

National Insurance—National Insurance Act, 1911 (1 & 2 *Geo.* 5, *c.* 55), *s.* 8 (1) (*c*) (*d*); *first Schedule, Part II* (*b*)—*Sickness Benefit—Disablement Benefit—Exceptions—Employment under Local Authority—County Council, Powers of—Terms of Employment—Execution of Works otherwise than by Contract—Maintenance of Roads by Direct Labour—Local Government* (*Procedure of Councils*) *Order*, 1899, *Art.* 25 (A)—*Superannuation of Officers—Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37), *ss.* 83, 109—*Meaning of* "*Officer.*"

Part II (*b*) of the first schedule to the National Insurance Act, 1911, excepts from the provisions of the Act an employment under a local authority where the Insurance Commissioners certify that the terms of the employment are such as to secure provision in respect of sickness and disablement on the whole not less favourable than the corresponding benefits conferred by Part I of the Act. Under Part I of the Act a disablement benefit is a periodical payment so long as the insured is rendered incapable of work, and has not attained the age of seventy.

Held, that a county council has no power to give to workmen employed on roads under a system of direct labour terms of employment securing to them provision in respect of disablement as favourable as that conferred by Part I of the Act, and that a county council cannot therefore, as regards such workmen, bring itself within the exception in Part II of the first schedule.

Such workmen are not "officers" within s. 83. sub-s. 11, of the Local Government (Ireland) Act, 1898.

TRIAL OF ACTION.

This action was brought to determine the question whether the county council of the North Riding of the County of Tipperary had power to give to its workmen terms of employment which would secure sickness and disablement benefits. The county council had for some time past adopted a system of direct labour for the maintenance of the roads under the powers conferred by Art. 25 (A) of the Local Government (Procedure of Councils) Order, 1899, and had been in the habit of allowing sickness and disablement benefits to their workmen, somewhat

M. R. 1914. TIPPERARY CO. COUNCIL *v.* IRISH INSURANCE COMMRS.

similar, but on the whole superior, to those provided by the National Insurance Act, 1911, and it was found that the annual expenditure under the head of such allowances was on the average of several years past far below the sum which the insurance of workmen under the Act would cost.

In August, 1912, the county council came to the conclusion that, in order to save expense to the rates and to avoid difficulties in carrying out the Act, it was desirable to frame a scheme by the adoption of which they would be in a position to apply to the Commissioners for a declaration that the workmen employed on roads and other public works within the county should be deemed to be excepted persons.

Accordingly, in September, 1912, the county council adopted a report giving the heads of a scheme which purported to give to their workmen terms of employment securing sickness benefit and disablement benefit equivalent to or greater than the benefits conferred by the Insurance Act. This report was submitted to the Insurance Commissioners, but they declined to consider it, on the ground that the county council had no power to frame any scheme giving sickness and disablement benefit to their workmen. This action was then brought by the county council against the Commissioners, claiming (1) a declaration that the plaintiffs were entitled to arrange with their workmen employed under the system of direct labour upon highways within their county such terms of employment as to secure to such workmen provision in respect of sickness and disablement on the whole not less favourable than the corresponding benefits conferred by Part I of the National Insurance Act, 1911; (2) an order in the nature of a mandamus requiring the defendants to grant to the plaintiffs a certificate of exemption from the provisions of the Act, certifying that the terms of employment under the said scheme were such as to secure for their workmen provisions in respect of sickness and disablement on the whole not less favourable than the corresponding benefits conferred by Part I of the National Insurance Act, 1911; (3) an injunction to restrain the defendants from taking or proceeding with legal proceedings against the plaintiffs for penalties or otherwise under the said Act in respect of the non-insurance of such workmen as aforesaid.

Pleadings having been delivered, the action came on for trial before the Master of the Rolls on the 17th and 18th June, 1914. After the plaintiffs' case had been opened by Serjeant Sullivan K.C., and evidence given on their behalf, the Master of the Rolls was of opinion that the Attorney-General should be made a party to represent the interests of the ratepayers, and liberty was given to the plaintiffs to amend the proceedings, by making the Attorney-General a party thereto and otherwise as they might be advised. This having been done, the case came on again for hearing on the 11th November, 1914.

Serjeant Sullivan K.C. (with him *Conner K.C.*), for the plaintiffs:—

The Insurance Commissioners refused to consider the scheme submitted by the county council, on the ground that the council is not a local authority which can make a scheme for sickness and disablement benefit in lieu of the provisions in the National Insurance Act. The Local Government Act, 1898 (61 & 62 Vict. c. 37), s. 4, transferred the business, powers, and duties of the grand jury to the county council, and by s. 1 it is entrusted with the management of the administrative and financial business of the county. The principal part of its business is the management of the roads. The National Insurance Act (1st Schedule, Part II) makes exemption possible for local bodies, not for individuals, if the local body can give as good benefits to their employees as the Insurance Commissioners can, and the funds of the local body are a guarantee that the money benefits will always be paid. The question is, has the county council power to make contracts with its employees which will give them sickness and disablement benefits? The council has power to work the roads itself, and therefore, has power to employ and pay men for road-making. If it has power to employ men on the roads, it has power to employ them on reasonable terms. Terms which the Legislature considered reasonable have been imposed upon employers by statute, *e.g.*, by the Employers' Liability Acts and the Workmen's Compensation Acts. Express power is given by statute to a county council to insure against accidents to workmen, namely, by the Local

M.R. 1914.

TIPPERARY CO. COUNCIL v. IRISH INSURANCE COMMRS.

Government (Ireland) Act, 1902 (2 Edw. 7, c. 38), s. 17, which authorizes a county council to insure against any liabilities of the council under the Workmen's Compensation Acts, 1897 and 1900, and the Employers' Liability Act, 1880, and at common law; and to pay the costs of such insurance out of any fund or rate applicable for defraying general expenses incurred in execution of the principal Act. This enactment shows that it would be reasonable for the county council to provide by contract with its workmen for compensation for disablement or sickness arising out of accident, which they could recover under the Workmen's Compensation Acts. In *Hinkson* v. *Price's Patent Candle Company* (1), Jessel M.R. held that a limited company had power to make it a term of the employment of a man who had worked for a year that he was to get a gratuity. In *Phillips* v. *London School Board* (2), where a superannuation fund for teachers was provided by deduction from their salaries, Vaughan Williams L.J. held that the power to assign a salary included a power to provide for deduction from salary.

The plaintiffs are quite willing to amend their proposed scheme; it was the Local Government Board who raised the objection that the county council had no power to frame a scheme, but suggested that the question should be decided by the Court.

The Solicitor-General (*O'Connor K.C.*) (with him *R. J. Sheehy*) for the Irish Insurance Commissioners:—

The county council is a rating authority, and has no power to pay men in its employment except in the ordinary way of business. It proposed to give what is equivalent to "disablement benefit" under the Act to a labourer, which may result in a payment of an annual sum to him for the rest of his life. Such a provision would impose a burden on future ratepayers. The duty of a rating authority is to raise enough money to meet the expenditure of the current year, but the proposed scheme would enure for the benefit of or impose a burden on its successors. A man seeking employment would accept lower wages if he was guaranteed future payments in the case of sickness or disablement.

(1) 45 L. J. Ch. 457. (2) [1898] 2 Q. B. 447.

Apart from statute, a rating authority cannot impose a burden on its successors, nor can it hoard money. It has to provide for the expenses of the current year, and cannot put by money.

Express statutory authority may be given to it to make permanent improvements, and to charge the costs on future years. Could the county council provide, *e.g.*, that the payment for the coal required for a year should be spread over subsequent years? Article 23 of the Local Government Order of January 30th, 1899, enables a council to enter into a contract for a term of years. A county council is a corporation, but a fluctuating one; it differs from a limited company: Grant on Corporations, p. 360. By Article 7 of the County Council Order of 18th April, 1899, payments are to be made at a quarterly meeting for work done not later than the close of the preceding quarter. This order was revoked by the Public Bodies Order, 1904, Art. 4, and payments are regulated by Articles 5, 13, and 19 of that order. Sect. 51, sub-s. 7, of the Local Government Act, 1898, provides that every demand payable out of the poor rate is to be paid within the half year in which the same is incurred, or within three months after the expiration of the half year, not afterwards. The Local Government Act, 1902 (2 Edw. 7, c. 38), s. 4, empowered the Local Government Board to extend the time to a period not exceeding two years. In *Rex* (*Drury*) v. *Dublin Corporation and Henry Campbell* (1), Palles C.B. says, at p. 100, that the ratepayers of each year should bear their proper burden. A number of statutes were passed providing in special cases for payment extending over a number of years, *e.g.*, Superannuation Acts. Sect. 125 of the Grand Jury Act, 1836 (6 & 7 Wm. 4, c. 116), enabled the grand jury to present at each assizes superannuation allowances to keepers, turnkeys, and matrons of prisons. 19 & 20 Vict. c. 68, s. 23, extended that power to all prison officers. That power was by 40 & 41 Vict. c. 49 transferred to the General Prisons Board. 38 & 39 Vict. c. 56 enabled the grand jury to grant superannuation allowances to county surveyors. The grand jury, it is true, only existed for the particular assizes, but the length of the time for which the local body holds office cannot

(1) 41 I. L. T. R. 98.

M. R. 1914.

TIPPERARY CO. COUNCIL v. IRISH INSURANCE COMMRS.

make any difference. 28 Vict. c. 26 enabled the guardians of a union to grant superannuation allowances to officers of the union. Sect. 270 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), authorizes compensation by way of annuity or otherwise to sanitary officers in certain cases. Sect. 83, sub-s. 11, of the Local Government (Ireland) Act, 1898, applies enactments relating to the superannuation of officers of boards of guardians to officers of county and rural district councils other than the county surveyor. Special powers have been conferred by Local and Personal Acts on municipal corporations: *e.g.*, the Belfast Corporation Act, 1899 (62 & 63 Vict. cap. ccxlvi), gave power to create a provident fund, and the Dublin Corporation Superannuation Act, 1905 (5 Edw. 7, cap. xxxi), gave the Corporation power to give superannuation allowances to artizans, workmen, and labourers in their employment, which could not have been done without statutory authority. These statutory enactments would not have been passed if superannuation allowances could have been granted without them. The proposal that the county council has power to pay disablement benefit in future is on the same principle as superannuation payments.

Wylie K.C. (with him *The Attorney-General* (*Pim K.C.*), and *Rearden*) for the Attorney-General.

The scheme is contrary to law. Two points have been argued: (1) Is there a power in a county council apart from the Insurance Act to enter into such a contract? and (2) Does the Insurance Act give that power?

As to (1). Payments by a county council must be audited, and the auditor must see that the payments are legal. Under the Local Government (Ireland) Act, 1871 (34 & 35 Vict. c. 109), s. 12, the auditor must disallow payments contrary to law. In *Rex* v. *N. G. Newell* (1), Palles C.B. says at p. 339—"No such payment can be legal unless authorized by statute expressly or impliedly." In *In re Hunter* (2) Lord Ashbourne says—"We cannot impose a rate upon a county without the clear authority of the words of some section of an Act of Parliament." A

(1) [1903] 2 I. R. 335. (2) 30 L. R. Ir. 204.

county council is a trustee for the ratepayer. Sect. 47, sub-s. 2, of the Local Government (Ireland) Act, 1898, provides that "A council shall not directly or indirectly apply any part of their county or district fund, or any moneys under their control, for any purpose not authorized by this or any other Act." Sect. 4 of the Act has been referred to, but there is nothing in that section which would authorize payment out of the rates to benefit labourers in the employment of the county council. The Union Officers Superannuation Acts are applied to officers of county councils by sect. 83, sub-s. 11, of the Act; they would not be necessary if the contention of the plaintiffs is correct.

As to (2). Has the National Insurance Act, 1911, given the county council any such power as claimed? Exception (*b*) in Part II of the First Schedule to the Act is a negative enactment. It only preserves the rights of local authorities who already have power to make provision for sick and disabled employees.

If the county council have power to make a contract for sickness and disablement benefits with a road-sweeper, they could make one with the master of a workhouse, although he is provided for under the Superannuation Acts. The Belfast Corporation Act, 1899, anticipated the Insurance Act. Part VI of that Act gave power to establish a provident fund by a scheme for payments to employees of the Corporation who might be absent from employment by reason of sickness or accident, or who might retire or be discharged by reason of infirmity. That Act was amended by the Belfast Corporation Act, 1902 (2 Ed. 7, cap. cix), s. 13. But for exception (*b*) the Belfast Corporation would have had to insure their employees under their Local Act and under the Insurance Act. The Asylum Officers Superannuation Act, 1909 (9 Ed. 7, c. 48), which provides for superannuation allowances to officers and servants employed in public asylums, affords another case in which the Insurance Commissioners might grant exemption. Exception (*b*) may well refer to authorities who are empowered by Local Acts to give benefits. Exception (*d*) excepts teachers in Ireland to whom the National School Teachers (Ireland) Act, 1879, applies. Sect. 13 is a positive provision enabling an approved society to submit a scheme to

M. R. 1914.

TIPPERARY CO. COUNCIL *v.* IRISH INSURANCE COMMRS.

vary benefits. Sect. 81, sub-s. 7, enables a county council to submit a scheme for the establishment of a county society. If the argument for the plaintiffs is right, the Insurance Act gives general powers to local bodies who have special powers under particular Superannuation Acts. In *The King* (*County Council of Cork*) v. *Sheehan* (1) the Cork County Council did not question the application of the Insurance Act to the case of labourers employed on the roads under direct labour schemes. It was there held that the contributions of the county council under the Insurance Act were district charges.

R. J. Sheehy :—

Disablement benefit was the difficulty in the view of the Commissioners; they were prepared to approve of the scheme if the county council could show them that it had power to superannuate its workmen, superannuation and disablement benefit being practically the same: see First Schedule, Part II, exceptions (*c*) and (*d*). The council has no power to superannuate labourers. Sect. 83 (11) of the Local Government Act, 1898, enables the council to superannuate officers, but the word "officer" does not include labourer. The officers of a board of guardians are specified in the general order of December 18th, 1882, Article 24. Besides, a poor law officer cannot be superannuated, unless he has devoted his whole time to the service of the union, is sixty years of age, and has served as union officer for twenty years at least: Union Officers (Ireland) Superannuation Act, 1865 (28 Vict. c. 26).

Even assuming that the labourers here are officers, they are not whole-time servants, the number employed varying according to the time of year.

The Attorney-General :—

Exception (*b*) meets the case of municipal corporations who have power by Local Acts to benefit their employees, otherwise there would have been a double provision, (1) under the Local Act, and (2) under the Insurance Act, as employees would have

(1) [1914] 2 I. R. 489.

to insure under the latter Act. Schemes of the Committees of Lunatic Asylums have been accepted by the Commissioners, but these committees have power under the Asylums' Officers Superannuation Act, 1909, to grant a gratuity or special superannuation allowance to a servant who is permanently incapacitated as the result of injury received in discharge of duty. A future county council may change the terms of employment granted by the present county council, to the detriment of the workman, as the terms of employment rest only in contract; but when the county council can by statute superannuate an officer, a future county council cannot alter the superannuation allowance. If exception (*b*) gave an implied power to provide for disablement, a county council would be at liberty to confer any benefits they liked on an employee, at the expense of future ratepayers. *Hinkson* v. *Price's Patent Candle Company* (1) was the case of a limited company, which is governed by other considerations. In *Phillips* v. *London School Board* (2) the opinion of Vaughan Williams L.J., relied on, was only a dictum.

Conner K.C. in reply :—

Sickness benefit is to be paid for a period not exceeding twenty-six weeks: sect. 8, sub-s. 1 (*c*). The Belfast Corporation Act of 1899 gives express power to pay persons who may be absent from employment by reason of sickness, &c. That would be a compliance with sect. 8, sub-s. 1 (*c*). With the exception of the Belfast Corporation, there is no local body in Ireland to which the Commissioners have given a certificate of exemption, which has power to give sickness benefit, unless the plaintiffs are able to give it. It was argued that in order to exempt a local body there must be a power of superannuation. But the power of superannuation has nothing to do with the case. The Dublin Corporation has got a certificate of exemption, although its Local Act of 1905 only gives power to grant weekly pensions to whole-time servants. An allowance under the Union Officers Superannuation Act, 1865, is not of right; there is only a power to grant. The benefit of superannuation is therefore not part of the officer's

(1) 45 L. J. Ch. 457. (2) [1898] 2 Q. B. 447.

M. R. 1914.

TIPPERARY CO. COUNCIL *v.* IRISH INSURANCE COMMRS.

terms of employment. Committees of lunatic asylums have been granted exemption, although they are only committees of a county council, which is refused exemption.

There are two answers to the argument for the Commissioners: (1) that the power of superannuation is not equivalent to the benefits conferred by the Insurance Act; and (2) that the county council has the power of superannuation, and should not be refused exemption when other bodies which have got a power of superannuation have been exempted. The Insurance Act enacts that a man is to get certain benefits. Is it not, then, a reasonable term of his employment that he is to get similar benefits, just as it might be a term of a man's employment to give him the same benefits as he would get under the Workmen's Compensation Act? The plaintiffs have been paying their workmen during sickness, and have not been surcharged. Disablement is not the same as superannuation; one difference is that disablement benefit lasts only as long as the man is incapable of work, whereas superannuation may last for life.

Terms of employment which would have been considered unreasonable years ago may now be considered reasonable. The terms imposed on employers by statute are reasonable terms for them to adopt. Section 82 of the Local Government Act, 1898, makes it the duty of a county council, according to its powers, to keep all public works (which include roads), maintainable at the cost of the county, in good condition and repair, and to take all necessary steps for that purpose. The Local Government Board can by rules and orders regulate the exercise of the powers of the county council (s. 106), but those rules and orders are operative only so far as they limit the powers, otherwise the county council has the powers conferred by the Act. Article 25A of the Local Government (Procedure of Councils) Order, 1899, authorizes the maintenance of roads by direct labour. The county council is bound to employ efficient men to keep the roads in repair. Its expenditure cannot always be confined within a year. If it has to insure its labourers under the Act, the stamps have to be paid for out of the rates to secure a future benefit. The provision for future benefit by contract with the labourers is analogous to that. The comparison of a limited company with a county council is a

fair one. In *Attorney-General* v. *London County Council* (1), it was held that the London County Council, having statutory powers to own and work tramways, could not run omnibuses as feeders to the tramways. That case recognized that a county council carried on a business.

It is not contended that superannuation allowance can be given to every labourer, but only to whole-time labourers. The term "officer" in sect. 83, sub-s. 1, may well include labourers. Sect. 109 provides that "the expression 'officer' includes any office, situation, or employment, and the expression 'office' shall be construed accordingly." There is nothing in the context in s. 83 requiring a different meaning to be given to the word "officer." Local authorities can be exempted only if they can give sickness and disablement benefits. The argument as to audit and the cases cited do not affect the question. It was said that the county council might be extravagant, and agree to give a workman a pension of £100 a year. There is no statutory power to give sickness benefit during employment, and, if the argument on the other side is correct, every payment to a labourer while he was sick should be disallowed; but it is not contended that the county council cannot pay men when they are sick. Exception (*b*) shows that the Legislature contemplated that public bodies who were employers might be exempted if the Commissioners thought fit.

Cur. adv. vult.

Dec. 3.

O'CONNOR M.R.:—

This action was brought for the purpose of settling a question of the utmost importance to county councils in Ireland. The county council of the County of Tipperary (North Riding), in pursuance of the Local Government (Procedure of Councils) Order, 1899, as amended by the Local Government (Procedure of Councils) Order, 1901, confirmed by 1 Edw. 7, cap. cxli, maintain their roads by direct labour. They consequently have a great number of workmen in their employment who come within the definition of "employed contributors," as used in the National Insurance Act, 1911, while the county council are their employers,

(1) [1901] 1 Ch. 781.

M. R. 1914.

TIPPERARY CO. COUNCIL *v.* IRISH INSURANCE COMMRS.

bound to pay contributions to the funds for providing the benefits conferred by Part I of the Act.

The benefits conferred are enumerated in sect. 8 (1), and they include what are described as "sickness benefit" and "disablement benefit." The county council, while recognizing to the full their liability under the Act as employers, maintain that they are competent to discharge their liability by giving to their workmen terms of employment which will secure provision in respect of sickness and disablement on the whole not less favourable than the corresponding benefits conferred by Part I of the Act. They rely upon Part II of the First Schedule to the Act, which excepts certain employments, including (*b*) "employment under the Crown or any local or other public authority where the Insurance Commissioners certify that the terms of the employment are such as to secure provision in respect of sickness and disablement on the whole not less favourable than the corresponding benefits conferred by Part I of this Act." The county council, whose business is conducted under very able legal guidance, and with a manifest disposition to do what is best for the ratepayers without in the least degree subtracting from the benefits conferred on employees by the Act, formulated a scheme containing terms of employment which purported to secure "sickness benefit" and "disablement benefit," and submitted it to the Irish Insurance Commissioners in order to get their certificate as required by the Act. The Commissioners, without going into the merits of the scheme, declined to give a certificate, on the ground that the county council had no statutory or other power to give terms of employment which would secure sickness benefit and disablement benefit. This action was accordingly brought by the county council against the Irish Insurance Commissioners for the purpose of getting a declaration by the Court that they are entitled to arrange with their workmen employed under the system of direct labour such terms of employment as to secure to such workmen provision in respect of sickness and disablement on the whole not less favourable than the corresponding benefits conferred by Part I of the National Insurance Act, 1911, and for an order in the nature of a mandamus requiring the Insurance Commissioners to ascertain

whether the terms of employment are such as to secure for the plaintiffs' workmen provision in respect of sickness and disablement on the whole not less favourable than the corresponding benefits conferred by Part I of the Act.

As the action was originally constituted, the Insurance Commissioners were the sole defendants, but when it came on for trial I intimated that the Attorney-General should have been made a defendant to represent the ratepayers, and an adjournment was obtained for the purpose of amending the record. The Attorney-General was made a defendant, and, the action having been again set down for trial, I had the advantage of having had the case argued by the Attorney-General from the special point of view of the Local Government Board.

Both the Insurance Commissioners and the Attorney-General contended that county councils had no statutory or other powers enabling them to give terms of employment to workmen which would secure to them provision in respect of sickness and disablement on the whole not less favourable than the corresponding benefits under the National Insurance Act, 1911. The first line of argument by the plaintiffs' counsel was that, although county councils were only creatures of statute, nevertheless, as they had statutory authority to employ workmen for the maintenance of roads, they had an implied power to give reasonable terms of employment to their workmen, and that, having regard to modern ideas which recognize the claims of workmen against employers, it would be only reasonable to make provision for sickness and disablement on the whole not less favourable than the corresponding benefits conferred by the Insurance Act. This is a very plausible proposition, but it requires to be tested by inquiring what is the least provision which must be made in order to provide the equivalent benefit. It is only necessary to deal with one of the benefits in question, because, if county councils have not the power to give terms of employment covering both benefits, the plaintiffs' argument fails. Let me then see what "disablement benefit" means. It means "periodical payments so long as so rendered incapable of work by the disease or disablement" (sect. 8, sub-s. 1 (*b*)) until the insured person has attained the age of seventy (sect. 8, sub-s. 3). In other words, "disablement

M. R. 1914.

TIPPERARY CO. COUNCIL *v.* IRISH INSURANCE COMMRS.

benefit" really means a pension for the disabled person from the term of his disablement for the remainder of his life, or until he attains the age of seventy years. Has a county council power to grant such a right of pension to a workman as a term of his employment? Up to the passing of the Insurance Act it was generally, if not universally, admitted that local authorities had no power to superannuate employees unless such power was conferred upon them expressly by statute. Hence the necessity for the several Acts, and sections of Acts, empowering such bodies as poor law guardians, asylum authorities, grand juries, prison boards, and others, to grant pensions to superannuated officers, and I should have thought all this special legislation was a statutory recognition that local bodies had no inherent power to give a right to pensions under the terms of an employment. Indeed, the Local Government Act itself gives express power to superannuate county officers (sect. 83, sub-s. 11), which is itself an indication that there would be no such inherent power in county councils. I am, therefore, of opinion that the whole trend of legislation is against the argument of Serjeant Sullivan that the power to employ implies a power to employ on terms which would secure a provision equivalent to disablement benefit, which in effect is a provision for a pension. But I go further, because I hold that a term of employment securing a pension would be directly opposed to the limitations put upon the power of county councils to employ direct labour in the maintenance of roads. That power was conferred on county councils by sect. 25A of the Procedure of Councils Order of 30th January, 1899. In order to bring that section into operation it is necessary for a county council to make a general declaration specifying the roads which have been selected by them as suitable to be maintained by direct labour. But that declaration is only to remain in force for a period of three years. If it is desired to prolong the system of direct labour, it is necessary to renew the declaration.

What is the meaning of this time limitation? To my mind none other than this: it was the intention of the Legislature that future ratepayers beyond the period of three years should not be involved by their predecessors in liabilities arising from the system of direct labour. This is absolutely inconsistent with a term of employment securing a provision equivalent to disablement benefit which would

involve ratepayers of twenty, thirty, or, perhaps forty years afterwards, in a liability to pay annuities to disabled workers. It is here that the distinction lies between an ordinary employer of labour—such as an individual or a manufacturing company—and a local authority. The individual may enter into a contract which will bind him at all future times; the company may incur a liability which will bind not only existing but future shareholders. A local authority is under restrictions in the imposition of future burdens. As in the case of direct labour the system is only binding for a period of three years, so in the case of contracts the contract for the repair of a road cannot be extended for a period longer than seven years: sect. 23, Procedure of Councils Order of 30th January, 1899. In aid of his argument that county councils, as employers of labour, have an inherent power to enter into such reasonable business arrangements as an individual could make, Serjeant Sullivan referred to the Local Government Act, 1902, sect. 17, which gives county councils power to insure against liabilities under the Workmen's Compensation Acts, the Employers' Liability Act, and at common law; but it seems to me that this special statutory provision may be referred to with great effect against his argument, because there would have been no necessity for statutory authority if county councils did not require it. I confess that I was more impressed by the argument that clause (*b*) of Part II of the First Schedule to the National Insurance Act impliedly gives power to local authorities to give terms of employment such as to secure provision in respect of sickness and disablement on the whole not less favourable than the corresponding benefits conferred by Part I of the Act. This argument would have had very great weight indeed, if there were no local bodies which had such powers independently of the Insurance Act. In such case clause (*b*) would have no subject-matter for its operation unless it implied the power contended for. But it was shown that in Ireland there was more than one local authority which had, independently, statutory powers of superannuation, under which benefits equivalent to disablement benefit and sickness benefit could be given. The Dublin Corporation, the Belfast Corporation, and the Committees of Lunatic Asylums, are instances, among others, and I am sure that there are many local and public authorities in England with like statutory powers.

M. R. 1914.

TIPPERARY CO. COUNCIL v. IRISH INSURANCE COMMRS.

There is, therefore, no necessity for implying a power in the local authorities in order to give full sense and meaning to clause (*b*), and it is a sound rule of construction not to imply anything in a statute unless the implication is necessary to make it intelligible and workable.

One further argument was used by Mr. Conner for the plaintiffs. He relied upon sect. 83 of the Local Government Act, 1898, as giving power to county councils to give superannuation allowances to labourers, which would be equivalent to disablement benefit. That section (sub-s. 11) provides that the enactments relating to the superannuation of officers of boards of guardians shall, with the necessary modifications, apply to officers of county and rural district councils. Mr. Conner said that officers include labourers, and he referred to the definition of "officers" in sect. 109, viz.:— "The expression 'office' includes any office, situation, or employment, and the expression 'officer' shall be construed accordingly." I do not say that this definition is not wide enough to include a labourer, but the definition clause is expressly made subject to the context, and reading sect. 83, sub-s. 11, and bearing in mind the class of officers of boards of guardians who could be superannuated, it seems clear that the labourers are not within the purview of the section. It must be remembered also that under the Local Government Act, 1898, county councils had no power to employ labourers; they only had power to work by contract. Therefore, as labourers could not have been employed by local bodies under the Local Government Act, 1898, it could not have been intended to include them as officers.

I have not, as I said before, thought it necessary to deal specially with sickness benefit, because if county councils are unable to give both sickness and disablement benefit, they cannot give benefits corresponding to those conferred by the Act. I must dismiss the action, but as it involved a very important question in which the public is interested, I will let all parties abide their own costs.

Solicitor for the plaintiffs: *Arnold Power.*

Solicitor for the Irish Insurance Commissioners: *Hugh Horan.*

Solicitor for the Attorney-General: *George Collins.*

W. L.

In re BUCHANAN.

STEPHENS *v.* DRAPER.

(1914. No. 570.)

M. R.
1914.
July 14, 17.

Appeal.
Nov. 23, 24.
Dec. 8.

Will—Construction—Annuity—Direction to pay out of Rents and Profits—Charge on Corpus.

A testator by his will devised and bequeathed to trustees certain houses, upon trust to receive the rents and profits thereof, and to pay thereout the head-rent and other outgoings, and as to the residue of the rents and profits after payment of the above, upon trust to pay a number of annuities to certain persons for their lives, and after their deaths to hold the annuities on trust for testator's son R., and, after payment of such annuities, to pay out of the residue of such rents and profits as the same should come to their hands a certain debt due by the testator. All the residue of his real and personal estate he devised and bequeathed to his son R. The rents and profits were insufficient to pay the annuities in full.

Held by the Court of Appeal (affirming the decision of the Master of the Rolls), that the annuities were a charge on the corpus.

Phillips v. *Gutteridge*, 3 De G. J. & S. 332, applied and followed.

Summons.

Robert Buchanan, by his will dated the 17th November, 1884, devised and bequeathed the houses and premises known as Nos. 28, 29, and 30 South Richmond Street, in the city of Dublin, with their appurtenances, unto his wife Frances Buchanan, and to the trustee and trustees for the time being of his will "upon trust for the following intents and purposes, that is to say, upon trust to receive the rents, issues, and profits of the same, and thereout to pay the head rent thereof, the landlord's proportion of income-tax, poor-rate, and municipal tax, and as to the residue of said rents and profits after payment of above (1) upon trust to pay to his said wife Frances Buchanan the yearly sum of £60 by two equal half-yearly payments, during her life, and after her death to hold the same upon trust to pay the said annual sum of

M. R. 1914.

STEPHENS v. DRAPER

£60 to his second son Robert Francis Buchanan, his executors, administrators, and assigns; (2) and upon the further trust to pay to his daughter Lavinia O'Connor, during her natural life, the yearly sum of £30 by two equal half-yearly payments, and after her death to hold the same upon trust to pay the said annual sum of £30 to his said second son Robert Francis Buchanan, his heirs, executors, administrators, and assigns; (3) and upon the further trust to pay to his daughter Mary Louisa Buchanan, during her natural life, the yearly sum of £15 by two equal half-yearly payments, and after her death to hold the same upon trust to pay the said annual sum of £15 to his aforesaid second son Robert Francis Buchanan, his heirs, executors, administrators, and assigns; (4) and upon the further trust to pay to his daughter Emma Jane Buchanan during her natural life the yearly sum of £15 by two equal half-yearly payments, and after her death to hold the same upon trust to pay the said annual sum of £15 to his said second son Robert Francis Buchanan, his executors, administrators, and assigns; (5) and upon the further trust to pay to his daughter Frances Stokes the sum of £1, "and as to the rest, residue, and remainder of the said rents and profits to hold the same upon trust to dispose of the same in manner following and hereinafter mentioned, and whereas I borrowed from my said eldest daughter Lavinia O'Connor the sum of £350, the repayment of which sum is secured to her by my bond with interest at the rate of £6 per cent. per annum, and which said sum of £350 is still due and owing to her, and as regards the same my will is and I hereby direct my said trustee or trustees for the time being to set aside the residue of the said rents and profits of the said premises Nos. 28, 29, and 30 South Richmond Street, after payment of the said several annuities as aforesaid, as the said surplus shall come to her or their hands to pay the same to the said Lavinia O'Connor, or if not living to pay the same to whomsoever she shall by deed or will direct, and in default of such direction then to her executors, administrators, or assigns, and to continue such payments until the said sum of £350 and interest (by rests) at the rate of 6 per cent. per annum as aforesaid shall be paid off and satisfied, and as to all the residue of my estate real and personal not hereinbefore disposed of, I devise and bequeath the same to my said

son Robert Francis Buchanan." The testator appointed his wife Frances Buchanan sole executrix and trustee of his will.

The testator died on the 29th November, 1884. The rents and profits were not in any year sufficient to pay the aforesaid annuities. The above-named second son Robert Frances Buchanan died on the 28th March, 1897, and by his will dated the 10th March, 1897, appointed the defendant Edward Danvers Draper, and Eliza Bryson Grant, executors and trustees of his will, and bequeathed to them all his interest in the said premises, including the said annual sums, upon trust either to retain or convert into money the same and hold the said premises and the investments representing the same and the income thereof upon the trusts mentioned in his will. On the 25th of August, 1897, probate of his will was granted to the defendant herein, Eliza Bryson Grant having renounced probate.

Mary Louisa Buchanan died on the 17th October, 1895. Lavinia O'Connor, by indenture dated the 9th June, 1898, assigned to the defendant the said sum of £350 due to her, and released the estate and effects of the testator from all claims in respect of her annuity of £30. Emma Jane Buchanan, by an indenture dated the 21st February, 1914, assigned to the defendant the annual sum of £15, payable to her, and released the estate and effects of the testator therefrom. Frances Buchanan, the widow of the testator, died on the 9th August, 1913, and probate of her will was granted to the plaintiff Henry Francis Stephens, the sole executor therein named, on the 24th April, 1914. No new trustee of the will of the testator, Robert Buchanan, had been appointed. At the date of the death of the said Frances Buchanan the arrears of her annuity amounted to £642. The defendant, Edward Danvers Draper, was in receipt of the rents of the said premises as trustee of the will of Robert Francis Buchanan, and the plaintiff had entered into an agreement with him for the purchase of a portion of the aforesaid premises, and a question was raised on the requisitions to title as to whether, having regard to the terms of the will, the aforesaid arrears of the annuity of Francis Buchanan were a charge on the corpus or were payable only out of the rents and profits of each particular year. The parties being unable to agree, the present summons was brought

M. R. 1914.

STEPHENS *v.* DRAPER.

by Henry Francis Stephens, as trustee and executor of the will of Robert Buchanan, against Edward Danvers Draper, executor and trustee of the will of Robert Francis Buchanan, the residuary legatee under the will of Robert Buchanan, for the determination of the following questions:—(1) Are the arrears of the annuities by the said will [of Robert Buchanan] directed to be paid to the said Frances Buchanan and the daughters of Robert Buchanan, a charge upon the testator's interest in the premises 28, 29, and 30 South Richmond Street, in the city of Dublin? (2) If not, are the said arrears a charge upon the rents of the said premises receivable after the deaths of the annuitants? (3) If not, are they payable only out of the rents received in each year, and liable to abate if such rents are deficient?

Poole, for the plaintiff.

Julian, for the defendant.

The arguments were similar to those in the Court of Appeal, reported *infra*. *Re Kelly* (1), and *In re West's Estate* (2), were also referred to.

July 17.

O'CONNOR M.R.:—

It seems to me that the most important feature of this will is that the testator does not specifically dispose of the property out of which the annuities are payable, except by charging it with annuities. This is an indication of intention that no one should derive any benefit from the property until the annuities were paid in full. The property passed to Robert Francis Buchanan under the residuary devise. If Mr. Julian's contention is right, he might take an interest in the property under the residuary clause, notwithstanding that the annuities remained unpaid; the property might become solvent and, if the annuitants disappeared, the residuary legatee might take an interest, though the annuities were in arrear. For this reason, I think the annuities were charged on the property. Secondly, the testator, after reciting that he is indebted to Lavinia O'Connor in the sum of £350, directs his trustees to set aside the residue of the said rents and profits, *after*

(1) 9 I. C. R. 103. (2) [1898] 1 I. R. 75.

payment of the said several annuities, for the payment of this debt; in other words, Lavinia O'Connor is to get the surplus after payment of the annuities, in liquidation of her debt. If the annuities are only payable out of the rents of each year, she might get paid, though the annuitants were unpaid.

In cases of this kind the words of the will are all-important. I go back to the first trust. It is to receive the rents, issues, and profits, and thereout to pay the head-rent, rates, and taxes. Now the rent is payable out of the lands, not out of the profits of any particular year. The second trust is to pay an annuity out of the same thing. Presumably, therefore, the second trust is also to pay out of rents generally. Mr. Julian relies especially on the trust arising on the death of the testator's wife—"from and after the death of my said wife, then I direct that the trustees shall hold the same upon trust to pay the said annual sum of sixty pounds to my second son, the said Robert Francis Buchanan." If the testator had created an annuity for the life of his wife, and then created a fresh annuity to be payable to his son, commencing at that date, there might be a great deal in Mr. Julian's argument. But, in fact, he put the same annuity in settlement for his wife for life. Now a tenant for life is entitled to be paid what is due to him before the remainderman gets anything; the enjoyment of the remainderman is always postponed to the tenant for life's right to payment. In my opinion the annuity given to the wife is charged on the property. It would be a curious thing, if the property turned out insolvent for a year, as, for example, by a tenant failing to pay, or a house being burnt down, that the testator intended that his widow should go without her annuity.

W. L.

The defendant appealed (1):—

Jellett K.C., and *Chadwick*, for the appellant:—

We rely (1) on the express words of the will—"to receive the rents, issues, and profits . . . and thereout to pay," and "as to

(1) In the Court of Appeal before O'BRIEN L.C. and HOLMES and MORIARTY L.JJ.

Appeal. 1914. STEPHENS v. DRAPER.

the residue of said rents and profits . . . to pay" the annuities now in dispute; (2) upon the fact that the testator disposes of the "rest, residue, and remainder of the said rents and profits after" paying the annuities; (3) and, further, upon the fact that when the testator comes to deal with the residue of his real and personal estate he does not use words, such as were used in many other cases, indicating that the residuary devisee should take subject to the annuities. The words of the will are "as to all the residue of my estate real and personal not hereinbefore disposed of I devise and bequeath the same to my said son Robert James Buchanan."

Carter v. *Salt* (1), *Bell* v. *Bell* (2), *In re Howarth*, (3), and *In re Young* (4) are examples of cases in which it was held that the annuities were charged on the corpus, but in all these cases there were such words in the settlement or will as "subject to," upon which the Court was able to hold that the annuities were charged on the corpus. There is no case, however, to show that a mere residuary devise enlarges the incidence of annuities given in the earlier part of the will. *Stelfox* v. *Sugden* (5) shows the distinction between cases where rents and profits are dealt with and nothing said about the residue, and cases where the residue is dealt with as well as the rents and profits.

The will in the present case has two characteristics: (1) an intervening clause disposing of the residue of the rents and profits; and (2) no such words, in the clause disposing of the residue of the real and personal estate, as "subject to." Where there is a direction in a will, as there is here, to pay the residue "from and after her death," there is no charge on the corpus: *Foster* v. *Smith* (6). The testator never contemplated that there would be a deficiency of income, for taking the will as it stands he evidently contemplated a surplus.

[They referred to *In re Bowden* (7); *Baker* v. *Baker* (8); *Salvin* v. *Weston* (9); *In re Bigge* (10); *Wurmald* v. *Muzeen* (11).]

(1) I. R. 1 Eq. 97.
(2) I. R. 6 Eq. 239.
(3) [1909] 2 Ch. 19.
(4) [1912] 2 Ch. 479.
(5) John. 234.
(6) 1 Ph. 629.
(7) [1907] 1 Ch. 132.
(8) 6 H. L. 616.
(9) 12 Jur. (N. S.) 700.
(10) [1907] 1 Ch. 714.
(11) 29 W. R. 795.

A. C. Meredith K.C. (with him *Poole*) for the respondents:—

The principle enunciated by Lord Westbury in *Phillips* v. *Gutteridge* (1) rules this case. An indefinite charge of an annuity upon rents and profits makes the annuity a charge upon the corpus, unless there is something in the will to rebut that conclusion. The will here is almost identical in form with the will in *Phillips* v. *Gutteridge* (1), and provisions similar to those relied on by the appellant here are to be found in the will in that case—viz., the disposal of the surplus rents and the continuation of the annuity. Lord Westbury there distinguishes *Foster* v. *Smith* (2). *Carter* v. *Salt* (3), *Bell* v. *Bell* (4), and *Salvin* v. *Weston* (5) explain *Stelfox* v. *Sugden* (6). *Baker* v. *Baker* (7) has no application—see per Jessel M.R. in *In re Mason* (8). *In re Bigge* (9) is overruled by *In re Watkin's Settlement* (10). *Wurmald* v. *Muzeen* (11) cannot be regarded as authoritative. It was cited to Joyce J. in *Howarth* v. *Makinson* (12), who remarked, "the reports of that case are altogether unsatisfactory, and I shall pay no attention to it." It was not cited in *Howarth* v. *Mackinson* in the Court of Appeal (13). See also reference to it by Neville J. in *In re Bigge* (9) at p. 717.

[He also referred to *Farman* v. *Mills* (14); *In re Tootal's Estate* (15); *Birch* v. *Sherratt* (16).]

Jellett K.C. in reply:—

Farman v. *Mills* (14) and *In re Tootal's Estate* (15) do not apply, for in neither is there a word about paying out of rents and profits; a sum was set apart to pay the annuities. There are two answers to the arguments based on the annuity being given for an indefinite period. 1st, There is a direction to apply the surplus to another purpose, and 2ndly, the annuity to testator's son Robert is

(1) 3 De G. J. & S. 332.
(2) 1 Ph. 629.
(3) I. R. 1 Eq. 97.
(4) I. R. 6 Eq. 239.
(5) 12 Jur. (N. S.) 700.
(6) John. 234.
(7) 6 H. L. 616.
(8) 8 Ch. Div. 411, at p. 414.
(9) [1907] 1 Ch. 714.
(10) [1911] 1 Ch. 1.
(11) 29 W. R. 795.
(12) [1909] 1 Ch., p. 488.
(13) [1909] 2 Ch. 19.
(14) 4 Russ. 86.
(15) 2 Ch. D. 628.
(16) L. R. 2 Ch. 644.

Appeal. 1914.

STEPHENS v. DRAPER.

"from and after" his wife's death; a new trust thereupon arises and the old one comes to an end, and the old annuitant cannot take anything that would injure the new *cestui que trust.*

Cur. adv. vult.

O'BRIEN L.C.:—

I should have been content with the short, clear, and I think right, judgment of the Master of the Rolls without adding any observations of mine to it, but for the fact that we have been pressed with more than ordinary strenuousness to hold that he has violated legal principles by the decision he has arrived at.

I suppose it is in the nature of things that although the judges have over and over again, and particularly in connexion with cases of this kind, adverted to the principle that one case may afford little assistance in another—because very trifling differences of language may alter the construction to be placed on one will as contrasted with another—still reported decisions are brought forward to coerce the mind of the Court to arrive at a conclusion not, prima facie at any rate, in accordance with its judgment. But, of course, these cases, of which there have been many cited in the present instance, cannot be lightly cast aside, and, if laying down general principles, must be followed.

The will before us deals specifically with chattel property, then with freehold property, and next comes to property described as situated in the parish of St. Peter's, in the city of Dublin, held for a term of years at an annual rent. All these premises are bequeathed by the testator to the trustee or trustees of his will, his wife being named as the sole trustee, upon trusts which he thereupon declares, viz., that the trustees are to receive all the rents and profits, and after payment of head-rents and taxes they are to hold the "residue of the rents and profits" upon trust, amongst other things, to pay to his wife a yearly sum of £60, and on her death, or in certain other events not necessary to refer to, to pay this annual sum to Robert Francis Buchanan, who is the person also named as residuary legatee, and to his executors, administrators, and assigns. He then directs that the rents and profits are to be held upon further trusts to pay a number of annuities;

one of £30 to Lavinia O'Connor during her life; another of £15 to Mary Buchanan during her life; and another of £15 to Emma Buchanan during her life.

As to each of these annuities, described as annual sums, he directs that after the death of the annuitants the trustees are to hold each of the annuities upon trust for the several persons named, their executors, administrators, and assigns. Then as to the rest, residue, and remainder of the rents and profits, to hold "in manner following and hereinafter mentioned." These trusts are, by setting aside the residue of the rents and profits, and after payment of the annuities as the surplus should come to their hands, to pay to Lavinia O'Connor, one of the annuitants, or her appointee, or executors, or assigns, a debt of £350 due by testator to her, with interest at the rate of six per cent. per annum until the debt should be paid off and satisfied. Then comes a residuary gift of "my estates, real and personal, not hereinbefore disposed of," to Robert Buchanan.

Did the testator ever intend that if, by reason of tenants making default in any particular year, after payment of the head-rent and taxes there should be a deficient fund to meet the annuities in that year, the deficiency was to be borne by the annuitants, whose annuities are to be paid generally out of the rents and profits, the person to benefit not being a remainderman, but merely a general residuary legatee. That would not occur to me to be the natural construction; but minds differ.

If the testator had intended to do what the appellants contend, it would have been easy to have said "out of the rents and profits during the life of the annuitant to pay," or "to pay each year out of the rents and profits of that year only," an annual sum, or something of that kind; but he gives all the rents and profits without restriction of time, and out of that unrestricted bequest the trustees are to pay the yearly sum. But it is settled law that an unlimited indefinite charge of an annuity upon rents and profits is a charge upon the corpus, and here we have, as it seems to me, in the first instance such a charge. The Lord Chancellor in *Phillips* v. *Gutteridge* (1), a case still of the highest authority, says, "The

(1) De G. J. & S. 332.

Appeal. 1914. STEPHENS *v.* DRAPER. O'Brien L.C.

question therefore is merely whether an indefinite charge of an annuity upon rents and profits does not make the annuity a charge upon the corpus. I think that it does, unless, *as is not the case here*, there is something in the will to rebut that conclusion."

The words creating these annuities in *Phillips* v. *Gutteridge* (1) were, as near as you can get words, similar to those in the present case, and if there had not been *dicta* in later cases that, it is suggested, require to be reconciled with the statements which I have just quoted, the present case would prima facie come within this general principle, unless we can find in this will something which would repudiate the conclusion prima facie arising from the form of the bequest.

In *Birch* v. *Sherrat* (2), the testator directed his trustees to "invest the proceeds of sale of his real and personal estate and to stand possessed of the trust funds upon trust out of the interest, dividends, and annual proceeds to levy and raise the annual sum of £100 and pay the same by four equal quarterly instalments to his mother. Lord Cairns did undoubtedly say (p. 647) that "if the will had stopped at the end of the direction to pay the annuity the words would not appear to me, as at present advised, sufficient to constitute a continuing charge upon the income, or a charge upon the corpus, for the payment of this £100 a year"; but he says "I do not mean to say that there may not be cases in which a direction to pay out of a recurring income, or out of rents, may not indicate an intention to create a perpetual charge, but taking the words by which this annuity is given, and judging of them alone, I think they amount to nothing more than a direction to pay the annuity out of the income, if the income was sufficient."

Lord Cairns found in the words following, "from and after payment of the said annual sum and subject thereto," sufficient to justify a charge on corpus. Sir John Rolt L.J. does not, I think, acquiesce in the view I have quoted, while concurring in the result. The argument, however, has been built up here, that, unless there be such words as "subject thereto" following this indefinite gift, there is no charge on corpus. It seems to me

(1) 3 De G. J. & S. 332. (2) L. R. 2 Ch. 644.

I do not violate any authority in viewing this case from the standpoint of the Lord Chancellor, in *Phillips* v. *Gutteridge* (1), and if I find the clause commencing with the indefinite gift, I search the will to see is there anything to show that there was an intention *not* to charge on corpus.

Beyond doubt there is this to be said, that in very many of the cases it was the existence of such words as "subject thereto" on which the Court based its decision. *Howarth* v. *Makinson* (2) may fairly be stated as an authority where the existence of these words affected the mind of the Court, but *Phillips* v. *Gutteridge* (1) was distinctly recognized in that case, as of course it must be, as an authority not to be departed from, and it does not follow that because you can easily solve the question in any case by the presence of particular words, their absence must necessarily produce a contrary result in another case.

Cases where the will shows that the corpus is looked upon as entire after the annuitant's death were cited, and in these cases there is no charge as a rule on corpus; but the more I look at the present will, the less such cases seem to me to apply. Before any part of this property can fall into the residue, Lavinia O'Connor has to be provided for. There is no limited time for the payment of her debt and interest. She certainly seems to me to be entitled to get her debt out of corpus, so that the corpus may or may not be untouched and intact before the rights of the residuary legatee arise.

The interposition of this direction, which it was never contemplated would arise to the detriment of the annuitants, sufficiently differentiates the case from cases where, on the death of the annuitants, property is specifically to go over to some other named person, that is if it be right at all to apply such authorities as between annuitants, where annuities are to be paid as in the present case, and where the contest is with a mere residuary legatee.

Great stress was laid in the arguments upon the probability that the testator did not contemplate a deficiency. Such an argument may afford in some cases a clue to the intention. Lord Cairns relied on it in *Birch* v. *Sherratt* (3), and it was

(1) 3 De G. J. & S. 332.
(2) [1909] 2 Ch. 19.
(3) L. R. 2 Ch. 644.

Appeal. 1914.

STEPHENS v. DRAPER.

O'Brien L.C.

relied on in other cases which it is not necessary to refer to in detail; but it never can be more than an element, and it cannot absolve one from the obligation of looking at the general words of the will to discover the intention.

Baker v. *Baker* (1) was an authority strongly pressed. It has been explained in two ways, and, no doubt, it bears both explanations. In one respect it helps the respondent. The first explanation is given in *Carter* v. *Salt* (2), where the Master of the Rolls says: "The question in that case was whether there was enough to show that the testator intended the fund devoted to secure the annuity to go over in its integrity on the death of the annuitant, whether that fund is in truth divided into an estate for life and a remainder." In *Mason* v. *Robinson* (3), Jessel M.R. refers to it as "an instance in which the testator has not given the annuity at all, but has directed a sum of money to be set apart which shall be sufficient to pay an annual sum, and then directs the income of the sum so set apart to be paid to a person for life. That is not a gift to an annuitant of a sum of money specifically mentioned, but it is a direction to set apart a capital sum, and what is given, and what the person to whom the income is to be paid takes, is the income of that capital sum which accrues due during his life, and nothing else." Either explanation shows that *Baker* v. *Baker* (1), properly considered, has no application to the present case.

Stelfox v. *Sugden* (4) was, of course, most strongly pressed. There, there was undoubtedly a direction to pay an annuity out of investments without restriction as to time, but in that case the Vice-Chancellor, Sir William Page Wood, based his judgment altogether upon the peculiar terms of the will, and added, "Now, if the will contained those directions alone"—that is to say, a direction to provide for the payment out of dividends of the annual sum of £100—"and omitted the intervening direction with reference to the residue of the interest and proceeds during the life of the testator's wife (which seems to me to be alone conclusive of the question before me)—if it were the simple case

(1) 6 H. L. C. 616.
(2) I. R. 1 Eq. 97, at p. 108.
(3) 8 Ch. D. 411.
(4) John. 234.

of a gift, at the commencement of the bequest, and of all dividends and income, without limit as to time, for the purpose of meeting a certain annuity, and after the death of the annuitant a bequest of the residue of the principal sum to other parties,—the construction for which the widow contends being thus confirmed at both ends of the bequest,—the authorities cited would be strongly in favour of the contention that the annuity is a charge on the corpus."

The same learned judge in *Salvin* v. *Weston* (1), referring to his own previous decision, says: "Amongst others, there is the rule that payments given indefinitely out of rents and profits would amount to a charge upon the corpus. There is also the other rule, as in *Baker* v. *Baker*, that a gift over of property apparently intended to pass in its entirety, is inconsistent with the charge. Besides this second rule there is another intermediate rule, which I followed in *Stelfox* v. *Sugden* (3), that you are to collect from all the circumstances of the will whether there is or is not a clear and manifest intent that the annuity shall be paid out of the rents and profits, and not paid out of corpus." The learned Vice-Chancellor found that intention in a direction, the absence of which would have produced in his mind a different conclusion. There is nothing contrary to what was laid down in *Phillips* v. *Gutteridge* (4) in this decision. On the contrary, the same proposition is referred to, that on the whole the will had to be construed on its special language.

With regard to the case of *Wormald* v. *Muzeen* (5) on appeal, it has been pointed out more than once that the report of the case is very unsatisfactory. One thing is clear, that the Master of the Rolls in giving judgment said, "I decline to go into decided cases. The very fact of other cases being similar, though not identical in terms, is more likely to mislead the Court than not." Applying the same principle to the present case I think that the intention of the testator is sufficiently shown, and that it would be perversion of intention to apply the general observations of the Master of the Rolls in *Wormald* v. *Muzeen* (5) in the same

(1) 12 Jur. (N. S.) 700.
(2) 6 H. L. 616.
(3) John. 234.
(4) 3 De G. J. & S. 332.
(5) 45 L. T. 115; 29 W. R. 795.

Appeal. 1914.

STEPHENS v. DRAPER.

O'Brien L.C.

way as he considered it dangerous to apply the language of other wills to determine the particular will in that case. I think to apply that case in the present would be not to adhere to authority, but to depart from it.

It has been urged that no assistance is gained by reason of the fact that whatever residue there was passed only under a general residuary clause, and is qualified by the words "not hereinbefore disposed of." I do not accept this view. I do not suggest that the words "not hereinbefore disposed of" have of themselves in every case, or could have in every case, a coercive effect; but they aid one, just as the words, "such part thereof as shall remain undisposed of," in *Phillips* v. *Gutteridge* (1) seem to me to have helped the decision arrived at in that case, and in any case they emphasize the fact that this is a contest not between tenant for life and remainderman, but between annuitant and residuary legatee.

I end at the point from which I started. I can see nothing in the cases coercing me to come to a different conclusion from what I should have come to if unaided by authority. I think *Phillips* v. *Gutteridge* (1) is a clear existing authority applicable to the present case, if authority is needed.

HOLMES L.J.:—

I concur. As soon as I read the judgment of the Master of the Rolls it seemed to me convincing, and I can find nothing in the will to suggest that I should come to a different conclusion. However, as the authorities are, or rather were some years ago, doubtful, I should have examined them in detail, were it not for the decision in *Phillips* v. *Gutteridge* (1). Unless we overrule that decision, it appears to me that we must affirm the Master of the Rolls, and I cannot see why we should be called on to overrule a case which seems to be in accordance with all principles of law and common sense.

MORIARTY L.J.:—

Mr. Stephens, as trustee and executor of the will, dated the 27th November, 1884, of Robert Buchanan, who died on the

(1) 3 De G. J. & S. 332.

29th November, 1844, has by originating summons sought the opinion of the Court as to whether the unpaid arrears of certain annuities given by the said will are a continuing charge upon the corpus of the three houses, 28, 29, and 30 South Richmond Street, Dublin, which were devised by the said testator to the trustees of the will for the purpose of paying the said annuities.

The said testator in his said will declared as follows:—[His Lordship stated the trusts of the will as set out above.] In the events that happened, the income of the houses was not sufficient to discharge the said annuity of £60 given to the said Frances Buchanan, owing principally to the necessity of satisfying prior incumbrances, and on her death, which occurred on the 9th August, 1913, the sum of £642 was due in respect of arrears of the said annuity. The question is whether that sum of £642 should be paid to the personal representative of Frances Buchanan, or falls into the residue as undisposed of. It must be paid to the personal representative of Frances Buchanan if the annuity was by the said will a charge upon the corpus of the three houses.

In my opinion this annuity was a charge upon the corpus, because there was an indefinite gift out of income, and no contrary intention can be inferred from the will. The trust was not to pay the wife an annuity of £60 out of income accruing during the life of the wife, but to pay her an annuity of £60 for every year that the wife should survive the testator.

During the argument we were referred to numerous cases on the construction of somewhat similar wills. As the Lord Chancellor has examined all the cases, it would be the merest pedantry on my part to go through them. Two of these cases (of very high authority) support the construction which I believe was the intention of the testator. They are *Phillips* v. *Gutteridge* (1) (decided by Lord Westbury in 1862) and *Ex parte Wilkinson* (2).

The principle, so far as it is possible to extract one from the cases, is, that if you find a trust to pay, out of income, an annuity, *and nothing either in the express terms of the will, or upon construction, to determine the time during which the income available*

(1) 3 De G. J. & S. 332. (2) 3 De G. J. & S. 633.

Appeal. 1914.

STEPHENS v. DRAPER.

Moriarty L.J.

for payment of the annuity is limited, then it may be a continuing charge.

I believe the testator's intention to have been that his widow should receive for her support £60 for *each* year that she lived, and that if, by any chance (by reason of the houses being temporarily unlet, or otherwise), there was a loss of income during any period, the deficiency should be made up out of the income of succeeding years. I do not think it necessary to rely upon the residuary clause in the will to support my judgment; but I cannot find anything in the residuary clause indicating a contrary intention. So far from it, the intention to be gathered is that the residuary legatee is only to take after the performance of the *antecedent trusts*, which make this case as like as possible to *Phillips* v. *Gutteridge* (1). I am in entire agreement with the judgment of the Master of the Rolls, from which the appeal was taken.

Solicitors for the plaintiff: *Sutton & Co.*

Solicitors for the defendant: *French & French.*

J. M.

(1) 3 De G. J. & S. 332.

M. R.
1914.

March 4, 5, 11, 12.
April 1.

Appeal.
Nov. 30.
Dec. 1, 2, 19.

JAMES L. MURPHY & CO., LIMITED *v.* CREAN.

(1913. No. 689.)

Licensing Acts—Agreement in Contravention of—Attempt to create Property in Licence apart from Premises—Agreement for Transfer of Licence from one House to Another—Agreement to deal exclusively with Firm of Brewers for Porter to be sold in House to which Licence transferred, and to deposit Licence with Brewers to be at their Disposal—Transfer by Licensing Authority—Invalidity of Transfer—Illegality of Agreement—Agreement illegal on Face—Illegality not pleaded—Breach of Agreement—Acquiescence—Tied House—Contract in Restraint of Trade—Consideration—Agreement to take fixed quantity of Porter—Establishment by Brewers of another Tied House in Neighbourhood.

By an agreement dated the 5th July, 1892, purporting to be made between the plaintiffs, a brewery company, and the defendant, the occupier of a house in D. Street, in the borough of C., it was recited that the company were beneficial owners of a licence for a house in B. Street, and that the defendant had requested the company to allow her to apply for a transfer of the licence to the house in D. Street to her own name, and to sell thereunder, to which the company agreed on her undertaking to pay them the sum of £300 secured by a bond executed by her contemporaneously, and the defendant thereby agreed to take all necessary steps to have the licence transferred to her own name, and to the house in D. Street, and to maintain the licence in full force, and renew it, and to indorse and deposit it with the company, to be transferred by her to such other person and house as the company might name, the £300 to be repaid to defendant on such transfer being obtained from the licensing authority. The defendant further agreed, while licensed, to deal exclusively with the company for all porter, and for all stout so long as they should brew and vend stout, which she should sell on the premises or elsewhere under colour of the licence, and also to purchase from the company four tierces of porter in every month, and the company agreed to supply her while licensed with such quantity of good merchantable porter and, so long as the company should brew and vend stout, such quantity of good merchantable stout as she might require, on being paid in cash therefor the price usually charged to customers.

The agreement was executed by the defendant under seal, but was not executed by the company. The company had purchased the licence of the house in B. Street (apart from the house itself) for £160 in 1891, and the defendant had obtained at quarter sessions an interim transfer of this licence to the house in D. Street at the licensing sessions in June, 1892, which was confirmed at the annual licensing sessions in October, 1892.

M. R.
1914.

JAMES L. MURPHY & Co., LTD. *v.* CREAN.

The defendant dealt with the company for porter, but only to a very small extent for stout, which she procured almost exclusively from another brewery, and in 1907 she entered into an agreement with this other brewery to sell its bottled stout exclusively. Throughout there was painted on the outside of her shop, "J. L. Murphy & Co.'s XX Stout." The plaintiffs were aware for a long time that the defendant was selling some stout of the other brewery, but did not know that she was selling it in large quantities till shortly before bringing the present action, which claimed damages for breach of the agreement of the 9th July, 1892, and an injunction to restrain the defendant from selling porter and stout other than that manufactured by the plaintiffs. The defendant pleaded want of and illegality of consideration, unreasonable restraint of trade, laches, and acquiescence. There was no plea that the agreement, apart from the consideration, was illegal.

Held, by the Master of the Rolls, that there was good and legal consideration for the agreement by the defendant to deal exclusively with the plaintiff company for porter and stout; that such agreement was not an unreasonable restraint of trade; that there was no such acquiescence on the part of the plaintiffs as would debar their right to the injunction sought, and that such injunction should be granted.

After the date of the agreement of 1892, the plaintiffs acquired another licensed house in the immediate neighbourhood of the defendant's and established it as a tied house.

Held, by the Master of the Rolls, that this did not relieve the defendant from her obligation to take the agreed quantity of porter from the plaintiffs.

Held, by the Court of Appeal, that the action should be dismissed.

Held, by O'Brien L.C. and Holmes L.J., that the dominant object of the agreement was an attempt to create property in a licence apart from the premises, in contravention of the licensing laws, and that the agreement was therefore illegal and not enforceable.

Held, by Palles C.B., that the transfer of the licence to the plaintiff by the licensing authority was made without jurisdiction and was void; that the effect of the agreement was to provide for the carrying on of a publican's trade under a document purporting to be a licence, which was mere waste paper, with an obligation on the defendant at the plaintiffs' request to transfer the licence to any house directed by them, and that such an agreement was illegal; that if there had been any valuable consideration for the agreement, it consisted in assistance in procuring a void licence; that the illegality pervaded the entire agreement, both the consideration and the promises; and that even assuming that the consideration had been legal, the promise sought to be enforced was illegal, being a promise to purchase from the plaintiffs porter and stout with a view to their being sold illegally.

Held, also, by the Court of Appeal, that as the illegality of the agreement appeared on its face, it was not necessary that such illegality should have been pleaded.

TRIAL OF ACTION.

The action was brought for breach by the defendant of an agreement to deal exclusively with the plaintiffs for porter and stout, and claimed an injunction.

The defendant by her statement of defence pleaded, *inter alia*, (*a*) that there was no consideration for the agreement, and that the consideration alleged therein was illegal and void; (*b*) that the agreement was an agreement in restraint of trade, and not binding on the defendant in point of law; (*c*) that the licence obtained by the defendant was granted by the licensing authority after full investigation, and not in pursuance of any bargain or agreement; (*d*) failure by the plaintiffs to supply the defendant with marketable stout; (*e*) laches and acquiescence; (*f*) presumption of release of the covenant; (*g*) opening by the plaintiffs of a rival premises in the immediate neighbourhood. There was no plea that the agreement, apart from the consideration, was illegal.

The action was tried before the Master of the Rolls with witnesses. The following statement, taken from the judgment of the Master of the Rolls, gives the material portion of the agreement and the circumstances in which it was made. The evidence as to acquiescence and other matters is summarized in the headnote and judgment.

"The plaintiffs in this action are James L. Murphy & Co., Ltd., who are brewers, carrying on business in the City of Cork. The defendant is Mrs. Hannah Crean, who is the licensee of a public house known as No. 3 Douglas Street in that city. The cause of action is the breach by the defendant of an agreement entered into by her with the plaintiffs to deal with them exclusively for porter and stout, and the relief claimed is an injunction restraining the defendant from dealing with any person or company, other than the plaintiffs, for porter or stout.

"The facts are as follows:—The defendant was married in the year 1890 to Mr. Eugene Crean, who had a leasehold interest in the premises No. 3 Douglas Street. They had been married for about two years, when it appears to have been arranged between the defendant and her husband that she should commence to

M. R. 1914.

JAMES L. MURPHY & Co., LTD. v. CREAN.

trade as a publican in her own name in these premises. She had not, however, a publican's licence, nor, so far as the evidence goes, was there ever a publican's licence attached to No. 3 Douglas Street. As the law then stood, it was legally possible to obtain a licence for a house which was previously unlicensed, but an applicant for a new licence was almost invariably confronted by the objection that the number of houses already licensed in the locality were ample for the wants of the community. To meet this objection a certain practice, of which the Court has judicial notice, sprung up; and this was, that the applicant for a licence for a house previously unlicensed should acquire an existing licence attached to another house, and, in order to remove the objection that the new licence would increase the number of public-houses, should give an undertaking to the Court to extinguish the existing licence which he had acquired. In substance this was the course adopted by the defendant when she applied for a licence for the house 3 Douglas Street. She did not indeed herself acquire a licence which had been attached to other premises, but one was acquired for her, and placed at her disposal, so that she might remove any objection on the ground of an increase in the number of licensed houses. The matter was carried out in the following way:—One Joseph Healy was licensed for the sale of beer, wine, and spirits in a house known as 32 Blarney Street, in the City of Cork. The plaintiffs, by arrangement with the defendant, purchased this licence from Healy at the price of £160, which the plaintiffs paid out of their own moneys. Having so acquired it, they concurred with the defendant in her application for a licence for No. 3 Douglas Street by giving her authority to agree for a surrender of the existing licence, so as to obviate an objection that the new licence would increase the number of public-houses. In these circumstances the defendant was granted the licence for No. 3 Douglas Street.

"This is the strictly legal account of the transaction, but it will be seen that contemporaneous documents describe it as a transfer of the licence from 32 Blarney Street to 3 Douglas Street. There was really no such thing known to the law, but the practice I have referred to became so usual that, in common parlance, the suppression of a licence for one public-house and the consequential

grant of a licence for another was described as a transfer, as in substance it was. Indeed, so much had the idea of transfer dominated not merely the lay, but the legal, mind, that the use of the term 'transfer' actually found its way into legal documents, and even into court records. In the present case we find that the defendant on the 26th May, 1892, served a notice on the clerk of the peace that she would apply at the next general quarter sessions of the peace to be holden at Cork on the 17th June, 1892, for a certificate to obtain a transfer of a licence lately held by Joseph Healy at 32 Blarney Street to 3 Douglas Street; that on the 17th June the application for a transfer was granted, and that on the 6th October, 1892, the transfer was confirmed at the Cork annual licensing quarter sessions.

"The acquisition by the plaintiffs of the licence attached to 32 Blarney Street, at a cost to them of £160, and the use allowed by them to be made of it by the defendant, were of course not mere acts of benevolence. In return, the plaintiffs were to have the exclusive right of supplying the defendant with porter and stout. This arrangement was embodied in articles of agreement dated the 5th July, 1892, expressed to be made between the defendant of the one part, and the plaintiffs of the other part. It recited that the plaintiffs were the beneficial owners of the licence under which Joseph Healy had carried on the business of a publican at No. 32 Blarney Street, and that the defendant had requested the plaintiffs to allow her to apply for a transfer of that licence from the house 3 Douglas Street to her own name, to which the plaintiffs had consented on her undertaking to pay them the sum of £300, to secure the payment of which the defendant had contemporaneously executed to them her bond and warrant for confessing judgment in the penal sum of £600, and of her agreeing as thereinafter contained. The defendant then agreed to take all necessary steps to have the licence transferred to her own name and to the house 3 Douglas Street, and when transferred, to maintain and renew the same, and to deposit the licence with the plaintiffs, to be thenceforth held by them for the purpose of having the same transferred to such other person and house as might be named by the plaintiffs. As ancillary to this agreement, the defendant gave certain powers to the plaintiffs,

M. R. 1914.

JAMES L. MURPHY & Co., LTD. *v.* CREAN.

and further agreed not, under any circumstances, to transfer or attempt to transfer the licence to any person or to any other house without the plaintiffs' consent, and that she would, while licensed, deal exclusively with the plaintiffs for all porter, and, so long as they should brew and vend stout, for all stout, whether on draught or in bottle, which she should sell on the said premises or elsewhere under colour of the said licence, and, further, that she would purchase from the plaintiffs, and pay in cash therefor, at least four tierces of porter in every month; and the plaintiffs also agreed that they would sell and supply to the defendant, while licensed, such quantity of good merchantable porter, and, so long as they should brew and vend stout, such quantity of good merchantable stout as she might require, on being paid in cash therefor the price usually charged by them to their customers; and further, that in case the plaintiffs should be desirous to transfer the licence from the defendant, or of her desiring to surrender the same, the plaintiffs would, on her obtaining from the licensing authority a final transfer thereof to such person as the plaintiffs might name, repay to the defendant the sum of £300, or so much thereof as she should have paid, provided that she should in the meantime have faithfully performed all and every portion of her part of the said agreement; but that, in case of her violating the same in any way, she should not be entitled to be repaid, nor should the plaintiffs be bound to repay her, any portion of the said sum, but that it should be lawful for the plaintiffs to enforce payment of any part thereof which might remain due.

"Contemporaneously with this agreement, the defendant executed her bond to the plaintiffs for the sum of £600, conditioned for the payment of the sum of £300. This was the sum of £300 mentioned in the agreement."

The Attorney-General (*Moriarty K.C.*) (with him *Ronan K.C.* and *Rearden*) for the plaintiffs :—

Serjeant Sullivan K.C. and *Conner K.C.* (with them *M. Healy*) for the defendant :—

The breach of agreement has been acquiesced in for twenty years; the plaintiffs benefited by this. They were carrying on an active business in porter with the defendant, but practically none in stout; this amounted to acquiescence. Since 1907, Guinness'

label has been displayed in the window, and the plaintiffs' traveller must have seen it. In 1911 the plaintiffs acquired licensed premises in 1 Douglas Street, and put a person into occupation. They have taken away our customers by their own act. *Dodd* v. *Churton* (1) shows that a covenantee who alters the position of the covenantor so as to render the performance of the covenant more onerous cannot enforce the covenant.

The agreement is in restraint of trade, and a covenant in restraint of trade, though under seal, is void unless there is good consideration: *Maxim-Nordenfelt Gun Co.* v. *Nordenfelt Co.* (2). The consideration stated amounts to nothing in law, or, so far as there is any consideration, it contemplates a direct contravention of the Licensing Acts. The plaintiffs had no interest in Healy's licence, as they had not got the premises; for a person cannot be the beneficial owner of a licence for a house in which he has no interest. *The King* (*Bourke*) v. *Justices of Dublin* (3) prevented transactions of this character. It was there held that the payment of money by the licensee ought not to be made a condition for granting a licence under the Licensing Acts. See per Fitz Gibbon L.J. at p. 443, and Walker L.J. at p. 444. In *R.* (*Peacocke*) v. *Recorder of Dublin* (4) it was held that a licence granted on condition of the applicant lodging a sum of money in Court to extinguish another licence was void *ab initio*. There is no difference in principle between paying money into Court and doing what was done here. Any agreement between the plaintiffs and Healy not to oppose the licence would be illegal. A neighbouring publican can only oppose as a parishioner: 3 & 4 Wm. 4, c. 68, s. 4. The licence which was extinguished here was not "in the neighbourhood." Blarney Street is a mile away from Douglas Street. The law was the same in 1892 as in 1903, when *The King* (*Bourke*) v. *Justices of Dublin* (3) was decided.

The agreement itself is to do a series of illegal acts: (1) to hand over her licence to another person while she was carrying on business as a publican; (2) to transfer the licence to a person having no interest in the premises.

The trader is bound under the Licensing Acts to produce his

(1) [1897] 1 Q. B. 562.
(2) [1893] 1 Ch. 657.
(3) [1903] 2 I. R. 429.
(4) 37 I. L. T. R. 145.

M. R. 1914.

JAMES L. MURPHY & Co., LTD. *v.* CREAN.

licence on demand to Excise officers and others, and also to the Court: 6 Geo. 4, c. 81, s. 28; 23 & 24 Vict. c. 107, s. 19; 34 & 35 Vict. c. 112, s. 10. The trade can only be carried on under the licence, and, if it is an agreement to carry on the trade on an illegal basis, the covenants regarding the trade are illegal. The Court should presume a waiver of the covenant: *Hepworth* v. *Pickles* (1), following Pollock C.B. in *Gibson* v. *Doig* (2); *Middleton* v. *Wallis* (3); *Tennent* v. *Neill* (4); *Kelsey* v. *Dodd* (5). An injunction should not be granted for a breach of this agreement, as it is unreasonable as being in restraint of trade. The covenant sued on bound the defendant, her executors, administrators, and assigns, to take only the plaintiffs' porter and stout without limit as to time. The limitation "while licensed" is not a limitation in point of time. The plaintiffs had no interest in the premises; they thought they had a property in the licence apart from the premises. Unless there is good consideration for the agreement, it is not binding. It makes no difference whether the agreement is under seal or under hand only. There is no evidence of any consideration outside the agreement. A past consideration would not be sufficient to support an agreement of this kind: *Kaye* v. *Dutton* (6). There is no suggestion that the defendant had made any agreement with the plaintiffs before the 5th July, 1892. The agreement recites that the defendant had requested the plaintiffs to allow her to apply for a transfer of the licence from Blarney Street, which they said they owned, to 3 Douglas Street, whereas, in fact, she had got a new licence for 3 Douglas Street at the sessions in June, 1892. There is no such thing as a transfer of a licence from one house to another. The justices could only take three things into consideration: (1) the character of the applicant; (2) the house; (3) the number of public-houses in the neighbourhood. Inasmuch as Blarney Street and Douglas Street are in different parts of Cork, and a mile apart, no question could arise before the sessions as to making the surrender of the one licence a condition for the granting of the other. There was no assistance given by the plaintiffs to the defendant towards obtain-

(1) [1900] 1 Ch. 108.
(2) 2 H. & N. 623.
(3) [1914] 1 I. R. 35.
(4) I. R. 5 C. L. 418.
(5) 52 L. J. Ch. 34.
(6) 7 M. & G. 807.

ing the licence ; she did not require any. In *Parker* v. *Baylis* (1), an agreement to assist a person to take out administration was held not to be binding. In *Hopkins* v. *Prescott* (2), an agreement to assist a person to obtain the office of distributor of stamps was held to be illegal. It was there held that it was a contract for the sale of an office, which was prohibited by statute ; but it serves as an illustration, and shows that, if one provision in an agreement is in contravention of a statute, the whole contract is void.

In *McEntaggart* v. *Byrne* (3) an injunction was granted by the Chancery Division to restrain opposition to the transfer of a licence at quarter sessions ; but there the person restrained was plaintiff in an action to enforce specific performance of an agreement for a lease of licensed premises, and he had agreed to protect the licence. Here the defendant agreed to take only the plaintiffs' porter and stout, and all they undertook to do was to assist her to get a transfer, which was impossible. Again, the agreement was not executed by the plaintiffs. They were not bound to continue to supply her with porter or stout.

Ronan K.C. in reply :—

A licence to sell wine might be granted to one for life, remainder to another for life, because by such licence not only an authority passes, but an interest : Bac. Abr., vol. vi, p. 644, citing *Thomas* v. *Sorrel* (4). The plaintiffs have done all they were bound to do under the agreement. There is no ground for saying that the agreement is unlawful as an unreasonable restraint of trade. In Pollock on Contracts, 8th ed., p. 379, will be found a table of cases in which restrictions of trade were held reasonable ; in some of them the restriction was unlimited in point of time. The author refers to *Avery* v. *Langford* (5), and the subsequent cases down to 1908. *The King* (*Bourke*) v. *Justices of Dublin* (6) is no authority for the proposition that the agreement is illegal as being in contravention of the Licensing Acts. There, a payment of a sum of money into Court was made a condition of granting a licence, and that was held to make the licence void.

(1) 2 Bos. & P. 73.
(2) 4 C. B. 578.
(3) 30 I. L. T. R. 165.
(4) Levinz, part i, p. 220.
(5) Kay, 667.
(6) [1903] 2 I. R. 429.

M. R. 1914.

JAMES L. MURPHY & Co., LTD. *v.* CREAN.

There is no suggestion here that the licence is void; the defendant does not say that she had not got a good licence. She got a certificate at quarter sessions pursuant to the Licensing (Ireland) Act, 1874, sect. 12, which entitled her to a new licence till the annual quarter sessions. The plaintiffs enabled her to go before the justices and say, "here is the licence for the other house," and she thought that it would be an advantage to have it. There was good consideration for the agreement. "Consideration" is defined in Stroud's Judicial Dictionary, vol. i, p. 378, thus: "Any act of the plaintiff from which the defendant derives (or expects to derive (*Haigh* v. *Brooks* (1)) a benefit or advantage, . . . however small the benefit may be, is a sufficient consideration, if such act is performed by the plaintiff at the request or with the consent, either express or implied, of the defendant." The consideration need not be expressed in the deed, if there was consideration in fact, as there was here: *Gravely* v. *Barnard* (2). *Kaye* v. *Dutton* (3) was referred to, but a distinction is drawn there between a past consideration where a promise would not be implied and where it would.

It is said that the clause that the plaintiffs should supply defendant with as much porter and stout as she should require is inoperative, because the agreement was not executed by the plaintiffs. But the doctrine of estoppel applies to a company as well as to individuals if they take the benefit of it. Having taken the bond, they could not allege that they did not benefit.

A party may be bound by a deed though he has not executed it: Norton on Deeds, p. 22, citing Coke on Littleton, 231A; *Webb* v. *Spicer* (4); *Read* v. *Anderson* (5); *Begbie* v. *Phosphate Sewage Company* (6).

The Recorder of Cork believed that it was a material thing in granting the licence to the defendant to consider the agreement to give up the licence of the other house. It was a matter for him to say whether the two houses were in the same neighbourhood. In *The King* (*Bourke*) v. *Justices of Dublin* (7) payment into Court

(1) 10 A. & E. 309.
(2) 18 Eq. 518.
(3) 7 M. & G. 807.
(4) 13 Q. B. 893.
(5) 13 Q. B. D. 779.
(6) L. R. 10 Q. B. 491.
(7) [1903] 2 I. R. 429.

to extinguish other licences was condemned where it was accepted as a condition of the grant of the new licence. Here there is no payment into Court nor condition made; all the party says is: "This may be of use to you; bring it before the Court." The Court of Appeal in that case was dealing with improper conduct by the licensing Court. Reference has been made to the provision in 6 Geo. 4, c. 81, sect. 28, imposing a penalty on a licensed person for not producing his licence to an excise officer within a reasonable time after demand; to section 19 of the Refreshment Houses (Ireland) Act, 1860 (23 & 24 Vict. c. 107), which authorizes a justice to require a person charged with an offence against the tenor of his licence to produce it for examination; to sect. 10 of the Prevention of Crime Act, 1871 (34 & 35 Vict. c. 112), requiring production of his licence by a licensed person before the Court; and to sect. 55 of the Licensing Act, 1872, requiring production of a licence in order to have a conviction recorded on it; and it was said that the defendant could not comply with any of these requirements if she had handed over the licence to the plaintiffs, as she was bound to do under the agreement if required. But she could have asked the plaintiffs for the licence to show it, and she in fact retained possession of the licence.

The defendant also relies on release, acquiescence, waiver, and laches, but there is no evidence of such. Acquiescence is the common element in a somewhat indefinite group of equitable estoppels, constituted by the fact that the person entitled has, as it is said, "slept upon his rights," and by his conduct at the time of the breach of them, or subsequently thereto, has, with full knowledge both of his own rights and of the acts which infringe them, led the persons responsible for the infringement to believe that he has waived or abandoned his rights: Encyclopædia of the Laws of England, vol. i, Title Acquiescence, p. 129. The defendant must prove that she believes that she has been released from the covenant. She does not suggest that she believed that the plaintiffs were satisfied that the house should be kept by her as a free house.

The fact that a plaintiff does not interfere to prevent a small and limited breach of an agreement does not conclude him for all

M. R. 1914.

JAMES L. MURPHY & Co., LTD. v. CREAN.

time in respect of a wider and more important breach: *Richards* v. *Revitt* (1), per Fry, J., at p. 226. In *Procter* v. *Bennis* (2), a patent case, it was held that there was no duty on a patentee to warn a person who was about to infringe his patent. *De Bussche* v. *Alt* (3) shows that if a person having a right and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. It would be a fraud if the plaintiffs believed that the defendant was under the mistaken belief that she might use the house as a free house, but no such case can be made.

The cases cited as to release are not in point. *Middleton* v. *Wallis* (4) was a case of landlord and tenant; two of the judges gave no opinion on the question of release. Cherry L.J. was of opinion that the covenant must be presumed to have been waived by the acts of the parties.

Hepworth v. *Pickles* (5) and *Re Summerson* (6) were cases of building schemes. The covenant there that was said to have been waived was a covenant that there should be no public-house on the land. That is a very different thing from a covenant not to buy stout from anyone but the covenantee. The putting up of a public-house in such a case was an obvious breach of covenant, whereas the mere buying of stout on particular occasions from another person might be a small matter.

Cur. adv. vult.

April 1.

O'CONNOR M.R., having stated the facts as above, proceeded as follows:—

It is seen from those documents that the transaction was described and regarded as a transfer of a licence from one public-house to another; but, as I have pointed out, the legal operation consisted of a discontinuance of one licence and the granting of another.

(1) 7 Ch. D. 224.
(2) 36 Ch. D. 740.
(3) 8 Ch. D. 286.
(4) [1914] 1 I. R. 35.
(5) [1900] 1 Ch. 108.
(6) *Ib.* 112, note.

One of the defences relied upon by the defendant is an averment that the consideration in the agreement for exclusive dealing with the plaintiffs was illegal. The contention was that the transaction of the purchase by the plaintiffs of the licence from Healy, which was void in law because the plaintiffs had not, nor did they acquire, any interest in his premises, and the use which the plaintiffs made of the licence in placing it at the defendant's disposal when she was applying for a new licence for 3 Douglas Street, in consideration of a private advantage, was, if not a corrupt consideration, at least contrary to the policy of the licensing laws. As I understood the learned counsel's argument, it was that the transaction amounted to a buying of support from a member of the public, who had a duty to discharge in objecting to a licence for some of the reasons mentioned in the 4th section of the Licensing (Ireland) Act, 1872. I cannot accede to this argument, and I see nothing improper in the transaction or contrary to law. It seems to me that under the licensing code, as it existed in 1892, it was quite legitimate for an applicant for a new licence to provide himself with the means of answering an apprehended objection that the number of public-houses ought not to be increased, by purchasing another licence so as to be able to show the justices that there would be no increase, because he was about to suppress, or procure the suppression of, another public-house in the neighbourhood. The closing of one public-house and the opening of another might indeed be a great public advantage, because one might be very unsuitable and the other very suitable. Further, I cannot see why the suppression of a licence, with the aid of money supplied by a third party, should vitiate the transaction. The money in the present case was supplied by a brewer, but it might have been supplied by a banker; but, no matter who supplied it, there should be some consideration for the accommodation. If the consideration moving to or from the brewer would be illegal, so too would the consideration moving to or from the banker be illegal.

The defendant's argument was based on the case of *The King* (*Bourke*) v. *Justices of Dublin*; *The King* (*Moriarty*) v. *The Same* (1).

(1) [1903] 2 I. R. 429.

M. R. 1914.

JAMES L. MURPHY & Co., LTD. v. CREAN.

But that case was very different from the present, as is to be seen from the judgment of FitzGibbon L.J., who said, at p. 443 :—"It is said that one of the conditions on which the original licence was obtained was the payment of a large sum of money into Court, to be placed at the disposal of the licensing authority — not for the benefit of the applicant, or of anyone interested in the transaction—but to be applied, at the discretion of the Recorder, for the benefit of some one else, on some future occasion, in or towards buying up some other licence for the purpose of extinguishing it." That is very different from extinguishing a licence at the time the application was made, because it supplied an existing fact which the Court might legitimately take into consideration when exercising a discretion; and it is to be observed that in *Reg.* v. *Bowman* (1), Wills J. expressed the view that the suppression of a licence by an applicant was a proper matter for consideration. Serjeant Sullivan, however, argued that even though the extinguishment of a licence by an applicant might have been a proper matter to consider if the licensed house was in the neighbourhood of the applicant's house, it could not have been so considered in the present case, because the suppressed licence was attached to a house in a situation remote from 3 Douglas Street—at least a mile away. But it must be remembered that the defendant's licence was granted so far back as the year 1892, and from that date down to the present treated as a valid licence. Am I now to decide, after a lapse of twenty-one years, that the justices were wrong in taking into consideration the extinguishment of a licence for a house in Blarney Street, because it was not in the neighbourhood of Douglas Street? There is no definition of "neighbourhood" in the Licensing Acts. The decision whether one public-house was so near to another house for which a licence was sought as to render a second unnecessary, was left to the justices, and it was quite within the jurisdiction of the Recorder of Cork to decide whether one part of his district was in the neighbourhood of another so as to come to a decision, as was well put by Mr. Ronan for the plaintiffs. Supposing the Recorder refused a

(1) [1898] 2 Q. B. 663.

new licence because, as he said, there were too many licences already in Cork, could he be held to have acted wrongly because all the public-houses in Cork might be considered not to be in the same neighbourhood?

Indeed the contention of the defendant, in addition to involving the validity of the agreement, also involves the validity of the licence under which the defendant has traded for so many years. It would seem to be an extravagant proposition coming from herself, that the licence which she obtained in 1892, and which she renewed from year to year up to the present time, was invalid.

The agreement was also impeached by the defendant on the ground that it imposed an unreasonable restraint of trade. The unreasonableness was alleged to consist in the absence of a time limitation. I am far from admitting that the absence of a time limit would avoid the agreement, but this is a wholly mistaken view of the agreement. It imposed a restraint on the defendant only for so long as she should trade under the licence mentioned in the agreement or any renewal thereof. This is the plain meaning of the agreement, and I can find nothing unreasonable in it, considering that the plaintiffs, at her request, advanced their own money to enable her to procure the licence.

Another objection was made on the ground that the agreement, being in restraint of trade, required a good consideration to support it. It was admitted that an agreement by the plaintiffs to supply porter and stout to the defendant would be a sufficient consideration for an agreement by the defendant to purchase such exclusively from the plaintiffs. It was, however, pointed out that the plaintiffs did not execute the agreement, and it was urged that it was not binding on the plaintiffs. I am by no means clear that, under all the circumstances of the case, it was necessary for the plaintiffs to execute the agreement in order to bind them to supply the defendant with their porter and stout, but I am relieved from going into this question, because there is another consideration to be found in the agreement, and one quite sufficient to support it. At the defendant's request the plaintiffs, at a cost of £160, placed at her disposal the use of the licence which was formerly Joseph Healy's. This was a good and valuable consideration for the contract, and there is nothing

M. R. 1914

JAMES L. MURPHY & CO., LTD. *v.* CREAN.

more required to make it binding on the defendant. It may or may not have been an adequate consideration, but that is immaterial, because, once a good consideration appears, the Court cannot consider its adequacy.

A defence which requires more examination is that of laches on the part of the plaintiffs in enforcing their rights, and acquiescence in the conduct of the defendant. It is well established that mere lapse of time is not a bar to the granting of an injunction unless the legal right is also barred, as, for instance, by the Statute of Limitations: *Fullwood* v. *Fullwood* (1); *Hogg* v. *Scott* (2). There must be something more than a mere abstention from legal proceedings—something more than mere quiescence. There must be that which the law calls acquiescence—that is some conduct on the part of the plaintiff calculated to mislead, and which in fact did mislead, the defendant, so as to induce her to spend money, or incur obligations, in the belief that the plaintiff had assented to her so doing. When this is the case, a moral wrong, amounting to fraud, would be perpetrated by the assertion of a right which the plaintiff had by his conduct led the defendant to believe had been abandoned. Let us see, then, if there was any acquiescence on the part of the plaintiffs in this action, which has deprived them of the rights given to them by the agreement. The defendant commenced to trade in the year 1892. She has dealt regularly with the plaintiffs for porter, and so far as porter is concerned there is no substantial complaint against her. She has not dealt with the plaintiffs for stout. On three, or at most four, different occasions since 1892, she got a cask of stout from them. Save for these she dealt exclusively in Guinness's stout. From 1892 to 1907 she bought the stout from Messrs. Kennedy & Co., who are bottlers for Guinness, and from 1907 she has been dealing directly with Guinness, and bottling herself. It may be said that, from 1892 down to a short time before the bringing of this action, the plaintiffs slept upon their rights. Indeed it was only in 1912 that the plaintiffs really woke up and entered a protest. But the question is—Did the plaintiffs so act as to lead the defendant to believe that they had abandoned their right to compel her to deal exclusively with them for

(1) 9 Ch. D. 176. (2) 18 Eq. 444.

stout, and did she so understand the plaintiffs? This must be ascertained by an examination of the conduct of both parties.

There is one uncontroverted fact which stands out prominently among all the others. There was painted on the outside of the defendant's shop in large and striking characters:—"J. J. Murphy & Co.'s XX Stout." This painting was done originally when the licence was granted. The outside of the shop has been re-painted at intervals (how many times was not mentioned), and the advertisement was always repeated, and is there at the present time, just as clearly as it was at first. This is certainly a strong fact against the theory that there was any change in the trade relations between the parties. When challenged as to this, the only explanation she offered was that it was the usual thing in the case of a *Murphy* house, and they owned the licence—a very significant observation. On the other hand, the defendant got no stout—practically none—from the plaintiffs. From 1892 to 1907 the defendant sold Guinness's bottled stout in increasing quantities. From 1907 down to the present, she has herself been bottling Guinness's stout in increasing quantities. She has been doing this under a special agreement with Messrs. Guinness, dated 4th Dec., 1907, under which she became entitled to use their special label, in consideration of an agreement on her part not to bottle, or sell in bottle, or supply in bottle, the extra stout, porter, or other brown beer of any other brewer or manufacturer for so long as they continued to supply her with the label. From the date of that agreement she has been openly using the label. This is in support of the defendant's case, but let me investigate the circumstances. We have the strange fact that the defendant had two agreements for exclusive dealing in stout with two rival brewers. There would not of course have been two conflicting agreements if in the year 1907 she had been expressly or impliedly released from the plaintiffs' agreement, so far as it relates to stout. Let us see whether the defendant thought she was so far released from the first agreement when she signed the second. She was cross-examined by Mr. Ronan as to the signing of the Guinness agreement. She said that she supposed she knew that she was breaking the agreement with the plaintiffs when she dealt with Guinness; she

M. R. 1914.

JAMES L. MURPHY & Co., LTD. *v.* CREAN.

afterwards said that when entering into the agreement with Guinness she did not think that she was breaking the agreement with the plaintiffs. The two answers are quite contradictory. Further, in her direct examination, when giving an account of her interview with Mr. Tivy, the plaintiffs' manager, in 1912, she said that he asked her, did she not know that she signed an agreement with the plaintiffs, and that her answer was, "Yes," but that she did not know its contents; but, on cross-examination by Mr. Ronan, she admitted that she knew she was bound to sell plaintiffs' porter, and that she knew it from the agreement. She further said that when the plaintiffs' manager accused her of selling Guinness broadcast, and reminded her that the licence was theirs, her reply was that she never sought the licence, that Murphy bought the house to put the licence in, and that she hoped that she did not incur any liability to pay a lot of money. Now, all this is evidence of the most unsatisfactory character, and does not appear to me to be the evidence of a person who was misled into the breach of her agreement. I am satisfied that she knew she was breaking a binding agreement, and was relying on the chance of the plaintiffs not discovering the full extent of her trading in Guinness, and knowing that they would pass over trifling breaches of the agreement.

It must be taken that the plaintiffs were aware for a long time that the defendant did sell some Guinness's stout, but there is nothing to show that they knew she was selling it in large quantities until 1912, when they protested against her doing so. A prudent person may well shut his eyes to a trifling invasion of his rights without losing them entirely, and leaving himself without remedy when he suffers a substantial and serious injury.

For the above reasons I am of opinion that the defence of acquiescence fails.

A further defence of a very special character has been raised. It is in answer to the plaintiffs' complaint that the defendant has failed to purchase four tierces of porter in each month in pursuance of the agreement. This complaint was not very much pressed by the plaintiffs at the time, because the important element in the case is stout. The defence, however, requires to

be dealt with. It is—that the plaintiffs in recent years opened in the immediate neighbourhood of the defendant's house rival licensed premises with the intent and purpose of attracting defendant's customers from her house, and thereby preventing her from obtaining purchasers for the plaintiffs' porter. Let me first observe that any such intent or purpose as alleged is quite unintelligible. It would be the interest of the plaintiffs to attract to one of their own tied houses the clients of a tied house of another brewery; but they are equally interested in all their own tied houses. It matters not to them whether their porter is sold in one house rather than another. So much for the intent and purpose. But what are the facts in connexion with the rival public-house referred to? This is no new establishment. It was open as a public-house before the defendant became a licensed trader. It was a tied house belonging to a brewery called Arnott's Brewery. In or about 1901 the plaintiffs purchased Arnott's Brewery along with the interest in its tied houses. Among these houses was the public-house in question, which belonged to a man named Ahearn. After the purchase he dealt with the plaintiffs until 1912, when he went out of business. The plaintiffs then purchased Ahearn's interest in the premises, spent some money in doing it up, and set it to a lady named Carroll, who entered into an agreement to deal exclusively with the plaintiffs. This lady seems to have had more business capacity than her predecessor Ahearn, because, since she commenced trading, the business appears to have prospered, while in Ahearn's time the trading was languid. I do not see how this can possibly constitute any defence to this action. The state of affairs of which the defendant complains appears to me to be nothing more than the result of an ordinary trade risk, of which the defendant must have had full knowledge when she commenced trading. Every trader who sets up an establishment knows that he takes the risk of a rival establishment being set up in his neighbourhood, and must be prepared to meet competition. The defendant knew perfectly well that hers was not the only licensed house in which the plaintiffs were interested—that they owned many such houses, and that it was their business interest to acquire as many as possible. She knew she was to have no monopoly, but she knew

M. P. 1914.

JAMES L. MURPHY & Co., LTD. v. CREAN.

also that the licensing laws put a restriction on the number of public-houses, and that she had this security. There is nothing in the agreement which prevented the plaintiffs from acquiring other public-houses in Cork, and indeed it was a matter of no consequence to defendant whether the plaintiffs would increase the number of their tied houses, because, whether the houses were tied to plaintiff's brewery, or some other brewery, competition would have to be encountered.

For these reasons I am bound to grant the plaintiffs an injunction restraining the defendant from selling any porter or stout other than that manufactured by the plaintiffs, and from dealing with any other person or company than the plaintiffs for porter or stout.

Having regard to the great delay of plaintiffs in asserting their rights, I might perhaps have allowed the parties to abide their own costs of the action, but the defendant set up a defence in support of which there was not a particle of evidence, viz., that the plaintiffs failed to supply defendant with marketable stout which she could sell to her customers, the only meaning of which was that the article was of an inferior character. This was a very serious disparagement of the plaintiffs as brewers, and it ought not to have been made without just cause. I must order the defendant to pay the costs of the action.

The defendant appealed to the Court of Appeal.

Serjeant Sullivan K.C. and *H. D. Conner K.C.* (with them *M. Healy*), for the appellant:—

The agreement sued on was one in restraint of trade; and such an agreement must not only be reasonable, but founded upon a valuable and legal consideration: *Mitchel* v. *Reynolds* (1); *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (2). In *Hitchcock* v. *Coker* (3), Tindal C.J. said: "If there is no consideration, or a consideration of no real value, the contract in restraint of

(1) 1 P. Wms. 181.
(2) [1894] A. C. 535, at 565.
(3) 6 A. & E. 438, at 456.

trade, which in itself is never favoured in law, must either be a fraud upon the rights of the party restrained, or a mere voluntary contract, a *nudum pactum*, and therefore void." Here, then, there was no consideration for the agreement. The suggested one, that of "allowing" the defendant to apply for a transfer, was, if a consideration at all, a past one. She had already applied for and obtained the licence: see judgment of Holmes L.J. in *Coleborne* v. *Kearns* (1); *Hulse* v. *Hulse* (2); *Hinde* v. *Gray* (3). The entire agreement is, however, illegal throughout and void. The plaintiffs never were, in fact, beneficial owners of Healy's licence, as recited in the agreement. Such a right could not exist apart from the ownership and possession of the licensed premises: *Brennan* v. *Dorney* (4); *The Queen* v. *Justices of Cork* (5). Assuming that the plaintiffs had any interest in Healy's licence, they could not legally transfer such interest to the defendant in order to enable her to influence the magistrates on her application for a licence for the new premises. Any such bargaining with the licensing authorities is wholly illegal: *The King* (*Bourke*) v. *Justices of Dublin*; *The King* (*Moriarty*) v. *The Same* (6); *The King* (*Peacocke*) v. *Recorder of Dublin* (7). Healy's house was not even in the neighbourhood of Douglas Street, and the magistrates could not take the question of his licence into consideration on the defendant's application. Part of the consderation being illegal, the whole is bad: *Lound* v. *Grimwade* (8). There could, in law, be no "transfer" of the licence from one house to the other. Further, the agreement contemplates the licence when obtained being endorsed and handed over to the plaintiffs—a wholly illegal thing. Section 28 of the Excise Licences Act, 1825 (6 Geo. 4, c. 81), provides for the infliction of a penalty on any licensed person who shall not produce and deliver his licence on demand of an officer of Excise.

Under sect. 19 of the Refreshment Houses (Ireland) Act, 1860 (23 & 24 Vict. c. 107), licensed retailers of wine, in case of a complaint before a justice, must produce their licences on the

(1) 46 I. L. T. R. 305.
(2) 17 C. B. 711.
(3) 1 M. & G. 195.
(4) 21 L. R. Ir. 353.
(5) [1895] 2 I. R. 104.
(6) [1903] 2 I. R. 429.
(7) 37 I. L. T. R. 145.
(8) 39 Ch. D. 605.

Appeal. 1914.

JAMES L. MURPHY & Co., LTD. *v.* CREAN.

requisition of a justice; and sect. 9 of the Beer Houses (Ireland) Act, 1864 (27 & 28 Vict. c. 35), contains similar provisions with regard to licensed retailers of beer, which includes porter.

By sect. 10 of the Prevention of Crime Act, 1871 (34 & 35 Vict. c. 112), any licensed person brought before a Court in pursuance of that section is required to produce his licence for examination, and sections 55 and 64 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), similarly require the production of licences. These sections could not be complied with if effect were given to the agreement. It is clear from them that the licence must remain on the licensed premises, and be immediately available for production. *Ritchie* v. *Smith* (1) shows that an agreement for a contravention of the Excise laws is illegal.

The plaintiffs' remedy, if any, under the agreement has been lost by long-continued acquiescence. For many years the defendant has never sold the plaintiffs' stout, and has, to plaintiffs' knowledge, been selling Guinness's stout. [They referred to *Kelsey* v. *Dodd* (2); *Sayers* v. *Collyer* (3).]

Serjeant Matheson K.C. and *Ronan K.C.* (with them *Rearden*) for the respondents:—

It cannot be said that there was no consideration for the agreement of 1892, which must be considered from the point of view then adopted by licensing authorities with regard to the granting of licences. They were anxious not to increase the number of existing licensed premises, and it is a matter of common knowledge that in those days an applicant for a new licence would buy up an existing licence, and obtain a transfer of it to the new premises. The plaintiffs, even if not beneficial owners, had obtained the control of Healy's licence for the Blarney Street premises; they could have effected the extinguishment of it at any time, and they placed this right of extinguishment at the disposal of the defendant. An interest may subsist in a licence apart from the ownership of the licensed premises. Thus a licence may be put into settlement. "A licence to sell wine may be granted to one for life, remainder to another for life; because by

(1) 6 C. B. 462.
(2) 52 L. J. Ch. 34.
(3) 28 Ch. D. 103.

such licence not only an authority passeth, but an interest, by way of restitution to that which was the subject's right before it was prohibited by statute": Bac. Ab., vol. vi, 144; *Thomas* v. *Sorrel* (1); *The King and Allen* v. *Newton* (2). The effect of the agreement was, that the defendant, when applying for a licence for the Douglas Street premises, could rely on the fact that, owing to the disappearance of Healy's licence, the number of existing licensed premises would not be increased. That was a matter of great importance for the defendant in making her application, and there was nothing illegal in such an agreement; it was a bargain between the parties, but there was no attempt to bargain with the licensing authority, as in *The King* (*Bourke*) v. *Justices of Dublin*; *The King* (*Moriarty*) v. *The Same* (3), or in *The King* (*Peacocke*) v. *Recorder of Dublin* (4). When there is a real consideration for a contract, the Court will not weigh the value of it; see judgment of Tindal C.J. in *Hitchcock* v. *Coker* (5). Healy's licence was an existing licence at the date of this agreement, and a transfer of it could not have been refused on the ground of the existence of an excessive number of licensed premises in the neighbourhood: *The Queen* (*Clitheroe*) v. *Recorder of Dublin* (6).

The consideration was not a past consideration. It is true the defendant's application to the magistrates was made prior to the written agreement, but the entire transaction must be dealt with as one. When the defendant applied for a transfer of Healy's licence, it is obvious she did so on the basis of a subsisting agreement with the plaintiffs. In any case the agreement was prior to the defendant's subsequent application for confirmation of the licence. There being a valid consideration, and there being nothing illegal in what is sought to be enforced by the injunction, the order of the Master of the Rolls should not be disturbed. *Savill Bros.* v. *Langman* (7) shows that an agreement for a tied house may be valid although not made between lessor and lessee of licensed premises. There is nothing in the licensing code

(1) Lev. 217.
(2) Bridg. R. 113.
(3) [1903] 2 I. R. 429.
(4) 37 I. L. T. R. 145.
(5) 6 A. & E. 438, at 456.
(6) 1. R. 11 C. L. 412.
(7) 79 L. T. R. 44.

Appeal. 1914. JAMES L. MURPHY & Co., LTD. *v.* CREAN.

requiring the licence to be kept on the licensed premises. The sections referred to which require production of the licence could be complied with by getting up possession of the licence from the plaintiffs.

As to acquiescence, conduct amounting to such acquiescence as would deprive a plaintiff of his legal rights must amount to what "would make it fraudulent for him to set up those rights." See judgment of Fry J. in *Wilmott* v. *Barber* (1). Nothing of the kind has been suggested here. The defendant obtained the benefit of the agreement, and should not now be allowed to repudiate it: *Webb* v. *Spicer* (2). The illegality of the agreement should have been pleaded: *Collins* v. *Blantern* (3).

Serjeant Sullivan K.C. in reply:—

The Court will not enforce an illegal agreement, whether the illegality be pleaded or not. [He referred to *Scott* v. *Brown, Doering, M'Nab, & Co.* (4); *Gedge* v. *Royal Exchange Assurance Corporation* (5); *North-Western Salt Co., Limited* v. *Electrolytic Alkali Co., Limited* (6).]

O'BRIEN L.C.:—

The importance of this case to my mind arises from the fact that an affirmance of the judgment of the Master of the Rolls would not be in accordance with what I conceive to be the trend of legal decision in this country with regard to spirit licences and dealings with them, and that a question of public policy is involved.

In one respect the operation of the statute commonly called Clancy's Act (7), which restricts the creation of new licences, makes the present case one of more limited application than it might have been if the action had been brought prior to the passing of that Act, but none the less it affects general principles.

The action in form is one merely as between Messrs. James J. Murphy & Co., Limited, an extensive and prosperous firm of

(1) 15 Ch. D. 96, at 105.
(2) 13 Q. B. 886.
(3) 2 Wils. 341.
(4) [1892] 2 Q. B. 724.
(5) [1909] 2 Q. B. 214.
(6) [1914] A. C. 461.
(7) The Licensing (Ireland) Act, 1902 (2 Edw. 7), c. 18.

brewers in Cork, against Mrs. Hannah Crean, to restrain her from acting in contravention of an agreement of the 5th July, 1892, by which she covenanted to trade with them for stout and porter to the exclusion of other brewers.

Save in respect of one matter which I shall deal with in the close of my judgment, it is not my intention, and I do not deem it necessary, to discuss any question of merits, if the agreement were enforceable. For reasons which I shall give, I am of opinion that it is not enforceable, and that the action must fail.

There is one principle of licensing law which is now absolutely well settled since the case of *Murphy* v. *The Cork Justices* (1), and indeed there has not been any real doubt on this question since the decision of the Court of Appeal in *Kelly* v. *Montague* (2). There is no doubt whatsoever that there can be no property in a spirit licence in Ireland apart from the premises in which the business is carried on by the licensed person. It is not that in a sense it does not and may not represent very valuable property, but it cannot be severed from the house and have the character of separate property. Possibly the minds of some lawyers were not quite settled in respect of this matter at the time when the agreement in the present case was entered into, but that cannot affect the question once the law is clearly ascertained. There is contained in the decisions of our Irish Courts a principle, not merely technical, but resting, as I conceive, upon the public policy of the Irish licensing code—namely, that a severance of licences from licensed premises, to be dealt with apart from and irrespective of the premises, and when separated to be manipulated in the interest of private individuals for their personal profit or gain, is not permitted by law, and it would be a grave misfortune if the law were otherwise.

It is impossible to read this agreement of the 5th July, 1892, without seeing that its main and dominant object is an open setting at defiance of this principle of law. It recites that Messrs. Murphy were the beneficial owners of a certain licence under which one Joseph Healy had carried on business in another part of the city of Cork called Blarney Street; and it recites a

(1) [1895] 2 I. R. 104. (2) 29 L. R. Ir. 429.

Appeal. 1914.

JAMES L. MURPHY & Co., LTD. *v.* CREAN.

O'Brien L.C.

request by Hannah Crean to Messrs. Murphy *to allow her to apply* for a transfer of this licence to 3 Douglas Street, and *to allow her* to sell under the said licence. Messrs. Murphy & Co. were not, and could not be, the owners of this licence as a thing apart from the premises in Blarney Street, as to which premises it is not pretended that they had one shred of ownership; while a reference to the document under which they attempted to acquire ownership of the licence, namely, an agreement of the 24th September, 1891, by which Mr. Healy purported to convey the licence to them, could not, nor is it contended at the Bar that it could, give them any ownership in it.

The material consideration for the covenant by which Hannah Crean covenanted to trade exclusively with the plaintiffs is based on the supposed but non-existing ownership, and the supposed but non-existing power to permit her to apply to the legal authorities for what is called in the agreement a transfer of this licence, but which, of course, was not in law, and could not be, a transfer. All that could be given in respect of the premises in Douglas Street was a new licence. I do not think it was seriously argued that, taken on its own language, a valid consideration is expressed. But the case was argued here, and successfully before the Master of the Rolls, upon another basis, which the learned judge considered justified in part his decision. It was said that you should look to the real consideration, and without any evidence we were asked to hold that what the document really meant was this—that as it might be a desirable thing to extinguish a licence in Blarney Street; that as the licensing authorities would be more readily disposed to grant a licence for 3 Douglas Street if such extinguishment was effected; and that as this would be a laudable and lawful thing, the real consideration was absolutely good and valid, to wit, a cancellation of the Blarney Street licence procured by the moneys of the plaintiffs; and that to this we must refer the grant of the new licence in respect of Douglas Street. We were appealed to on the plea that we ought to take judicial knowledge of a custom to this effect; but there is nothing whatsoever on the face of this document of any such agreement, and if I were at liberty to guess about it at all, I should be of opinion that no such arrangement existed in

fact. We know that there were other public-houses, and perhaps one might think enough of them, in existence quite close to this one in Douglas Street, but they were controlled by other brewers, and what was intended was not the extinguishment of a licence, but, what the parties thought might be effected, viz., a transfer of this licence from premises in respect of which Messrs. Murphy were satisfied it would not be as useful to them as in new premises where they would be able to sell in competition with other brewers their excellent porter and stout, in a neighbourhood from which they had previously been largely excluded, the other licensed houses being, as the evidence showed, tied houses.

It is a perfectly lawful thing for manufacturers to obtain the best market they can for their products; but when the trade in which they are interested is for public reasons hedged in by statutory restrictions, they must effect their object by means which are technically legal; but even if I was willing—and I do not think I can do it, especially having regard to the course of the trial—to import into this written document a consideration which is not the expressed consideration, this to my mind would not be of any practical advantage to the plaintiffs, because, as I have said, the dominant object in the whole of this document is the severance of the licence, and the keeping it in existence as private property apart from the premises. As I have said, I decline to enter into any speculation as to what might have been in the document. I find two recitals naturally and plainly fitting in with this avowed object and intention of creating a property in a licence apart from premises. I will not take them in any other sense.

When the licence is transferred, if it should be transferred, to Hannah Crean after she is *allowed* by Messrs. Murphy to apply for the transfer, she is then to hand over and deposit the licence with the company, to be held and retained by them for the purpose of having same transferred to such other person as may be named by the directors of the company, and for the like purpose she was to deposit with the company every renewal, and if she was directed by the company to transfer it to any other house or any other person whom they directed, and refused to do so, she apparently became liable to the penalty of the collateral

Appeal. 1914.

JAMES L. MURPHY. & CO., LTD. *v.* CREAN.

O'Brien L.C.

bond. At the same time, her refusal was of little practical use, as a power of attorney is given to the company to effect all those transactions in her name. This is a natural clause to find in a document which begins by an allegation that the plaintiffs were the beneficial owners of the licence, because if a person is a beneficial owner of a chattel it is natural that he should have the control of it.

Now it was said that the clauses in this deed were the ordinary clauses to be found in English precedents dealing with tied houses. I have looked through the forms in some of the leading text-books. In the main they seem to me to proceed upon a totally different line from the present document. There are documents where the brewers are owners of the premises, and where the last thing in the world that the brewers desire is a severance of the licence from the premises. I find clauses by which the licensed person is bound to renew and preserve the licence, and to deliver it to the landlord or the person or persons named by him for the purpose of transferring the licence, but I certainly have failed to discover a precedent where the licensed person is to be the owner of the premises, and the brewer the owner of the licence coupled with a right to its custody. If there be such a form that has escaped my notice, it would not affect me, because, as I conceive it, the law in Ireland would be violated if such provision were tolerated.

Even in cases where brewers are owners of the licensed premises, and where in Ireland what is called a tied house can be properly constituted, the licence not being severed from the premises, it is new to me that the actual custody of the licence can be taken away from the licensed person, and it seems to me that a provision which aims at this aims at violating a principle at the very foundation of licensing law in Ireland. The person who obtains the licence obtains it partly by reason of his personal fitness, partly by reason of the fitness of the premises in respect of which it is granted, but it is granted to him in pursuance of a public policy which exercises a scrutiny into the character of those to whom is granted an exclusive right of trading in certain excisable commodities. From the commencement of the laws regulating licences in Ireland, the Legislature imposed obligations

in respect of licences which the holders of those licences were not at liberty under penalty to violate. Even the licence itself became liable to what is called endorsement, which might lead ultimately to forfeiture.

There is nothing in the Acts requiring in express terms that the licences should be kept either in the pocket of the licensed person or on the premises, but to my mind the effect of the statutes amounts to this, that it must be available for certain statutory purposes, and that it must be available in the hands of the *licensed person* wherever it is actually kept. It cannot be placed in the hands of a third person, so that he if he pleased could prevent being carried out that which is provided for under penalty, namely, the production of the licence. Some of the occasions on which it has to be produced shows that this must be so.

Under 6 Geo. 4, c. 81, s. 28, the penalty of £20 is imposed for not producing and delivering the licence to be read and examined by the officer of excise within a reasonable time after demand.

Under 23 & 24 Vict. c. 107, s. 19, if a complaint is made before the justices of a licensing offence by the licensed party, the justices can require him to produce his licence for examination under a penalty of £5. By 27 & 28 Vict. c. 35 s. 9, if a complaint is made against any person, having an off licence, of allowing drink to be consumed on his premises, the justices can require him under penalty to produce his licence for examination.

Under 34 & 35 Vict. c. 112 s. 10, any licensed person brought before a Court under the section must produce his licence for examination and deliver it up for forfeiture if there should be a forfeiture.

Under earlier states of the law, and in theory still, although the existence of registers make the matter of no importance, the best answer that could be given to an officer entering premises where liquor was being sold, to prove that it was being lawfully sold, was the production of the licence. The fact that the licensed person might apply to a third person to give it to him was never contemplated.

I consider it is illegal to give a third person a control over the licence which he could, if he were so minded, exercise in defiance of the justices or the properly constituted officers of the law.

Appeal.
1914.
JAMES L. MURPHY & Co., LTD. v. CREAN.
O'Brien L.C.

The materiality in this matter, to my mind, of these considerations consists in the clear demonstration which they give that the dominant illegal purpose in this agreement was an endeavour to create property in a licence apart from the premises. The document is based on and permeated with illegality, and accordingly, in my opinion, it could not and ought not to be assisted by a Court in any way whatsoever. It is not a case of severing good from bad considerations. The dominant and real object is the effecting of an illegality by provisions at variance with the intention of public statutes.

It has been suggested here that as illegality is not pleaded, it cannot be relied on. As I understand the law, if the illegality appears on the face of the documents before the Court, and renders the whole contract bad, pleading is not necessary; and in addition to the cases which will be found collected in Bullen and Leake, I may refer to the case of the *North-Western Salt Company* v. *Electrolytic Alkali Co.* (1), where the principle was put in operation by the House of Lords, the illegality there being one of unreasonable restraint of trade. It is the duty of the Court not to assist in a violation of the law.

This being my view, it is not necessary to go into other questions which were discussed at the Bar, or into the merits. As I have already said, save on one point, I am not to be taken as expressing any view in favour of the defendant on the merits; but the Master of the Rolls made the defendant pay the costs of the action in the Court below, because, in addition to pleas for which there was some reasonable foundation, the defendant also, under cover of her defence, attacked the quality of the goods manufactured and supplied and sold by the plaintiffs, for which attack there was not in his opinion, nor is there in mine, any justification whatever, and accordingly for this reason I think that the action ought to be dismissed, but without costs. The appellant, however, not having raised this question in this Court, and being successful here, must of course have the costs of her appeal.

(1) [1914] A. C. 461.

PALLES C. B. :—

Applications to licensing authorities for certificates authorizing the grant of licenses for the sale of beer, wine, and spirits may be made in respect of two classes of houses, which—at least since the decision in *The Queen* (*Clitheroe*) v. *The Recorder of Dublin* (1), a decision binding on this Court—are subject to wholly different considerations.

The first class consists of houses which at the time of the application are licensed, and the second, of houses not then licensed. Applications with reference to houses within the first class are again divisible into those where (*a*) the application is for a certificate to the then licensed person to enable him to trade for another year—in other words, for a renewal; and (*b*) where it is for a transfer of the licence from the licensed person to another to enable that other to trade on the then licensed premises. As the licence is an authority to a named person to carry on trade in a described house, it is not only essentially personal to the named licensee, but is also attached to the described premises; and, if by reason either of the licensee's death, or of his ceasing to occupy the described house during the period covered by the licence, trade cannot be lawfully carried on in the house without further authority, and if that authority be conferred by transfer, it is confined to trade in the specified house. An application for that purpose is regulated by the Public House (Ireland) Act, 1855, which enables applications for the transfer of a licence then in force to be made in any of three events:—(1) Death of the licensed person; (2) the removal of the licensed person from the licensed premises; (3) the sale of, or assignment of the interest of the licensed person in the licensed premises by operation of law, or otherwise. In these cases there is jurisdiction in the licensing authority to transfer the existing licence by endorsement thereon, and under this section and subsequent statutes the trade may be authorized to be carried on, *on the same premises*, till the next annual general licensing sessions held in October, at which sessions the transfer may be confirmed.

(1) I. R. 11 C. L. 412.

Appeal.
1914.
JAMES L. MURPHY & Co., LTD. *v.* CREAN.
Palles C.B.

I refer to this elementary matter to emphasize this, that the sale of excisable liquors authorized by such a transfer—the only transfer known to the Licensing Acts—is sale *in the premises licensed* by the existing licence. The transfer affects the licensed person only—not the licensed premises. There is not in the whole licensing code any provision for the transfer of a licence from one house to another house. If the house in which it is desired to carry on a publican's business be not licensed in the then current year, the application must be for an original licence, and upon hearing such an application the licensing authority is bound to consider the number of previously licensed houses in the neighbourhood—a matter which *Clitheroe's Case* (1) decides cannot be entered upon on applications by licensed persons for renewals of their licences authorizing them to continue to trade in the same licensed premises, or upon a transfer authorizing a person other than the original licensee to continue to trade in the same licensed premises.

Shortly after the decision in *Clitheroe's Case* (1) there were attempts to apply the decision to cases really not within it. Whenever such cases came before the King's Bench, the orders granting the certificates were quashed upon certiorari, and in result it is a clear and undoubted elementary principle in licensing law that a certificate authorizing the grant of a licence in respect of previously unlicensed premises cannot be granted without an inquiry into the number of previously licensed houses. The objection to such a licence being granted upon a transfer is one which goes to jurisdiction. An order granting a transfer to different premises is without jurisdiction and void. The transfer and its confirmation in the present case, had they been brought up to the King's Bench Division within the prescribed period, would have been quashed as void on certiorari, and the omission to bring them up does not give them validity. They remain void, and their annual renewals are also void.

There is another elementary principle for which it is unnecessary to cite *Kelly* v. *Montague* (2), and the previous decisions there considered, viz., that a licence, being an authority

(1) I. R. 11 C. L. 412. (2) 29 L. R. Ir. 429.

to a named person to carry on trade in a specified house, cannot continue to exist if the occupation of the house ceases to be in that named person, unless some other person acquires statutable authority under a justices' order of transfer to trade under that licence.

In these circumstances it appears to me to be clear that the plaintiffs, who at no time were in occupation of the licensed premises, did not, by the assignment from Healy, acquire either legally or equitably the licence then held by Healy for the house in Blarney Street, nor any interest in such licence. The title to the licence, and that to the occupation of the house, had become vested in different persons. The utmost effect that I can attribute to that so-called assignment is an agreement by Healy that at the plaintiffs' request he would, within a limited time, that is within the then current licensing year, extinguish that licence.

The plaintiffs say that they thereby acquired the "beneficial interest" in the licence or, at least, what in argument has been called the control of the licence. In my judgment it is wholly inconsistent with the licensing code that anyone should hold, either legally or equitably, such a licence as it were *in gross*, that is, so that there should be a right enforceable either at law or in equity to have it transferred at his request to any house he should direct.

I now come to the agreement, part of the provisions of which is, by this action, sought to be enforced by injunction—the agreement of the 5th July, 1892. It begins with a recital which, however it may have been believed by the draughtsman, is false: "Whereas the said James J. Murphy and Company, Limited, are the *beneficial owners* of the licence for the sale of beer, wine, and spirits under which Joseph Healy hitherto carried on the trade or business of publican at 32 Blarney Street in said city." I regard the plaintiffs at this time as absolute strangers to the licence. In my judgment it ought not to have been renewed in the previous October. It does not appear that trade had been carried on under it even at the time of the alleged renewal, and neither Healy nor the plaintiffs had, in my judgment, any status in law to apply for a renewal—Healy, because he was not trading in the house; the plaintiffs, because they were not in occupation, and had no title to the licence.

Appeal.
1914.
JAMES L. MURPHY & Co., LTD. v. CREAN.
Palles C.B.

The agreement then proceeds to recite as matter to be done in the future that which had been already done, in other words, to recite as a consideration that which had been already done :—"And whereas the said Hannah Crean has requested the said James J. Murphy & Co., Limited, to allow her to apply for a transfer of said licence for the house No. 3 Douglas Street aforesaid to her own name, and to sell thereunder."

I have no doubt that at a previous time the plaintiffs must have given the renewal licence to Mrs. Crean, with a view to her procuring an order transferring it to her, to enable her to trade in Douglas Street ; but I must express my surprise that the licensing authority in Cork allowed such a transfer to be made. Their doing so was wholly beyond their jurisdiction. The order of transfer was void; the subsequent confirmation by the licensing justices was without jurisdiction and void ; and, as far as I can see, the carrying on of the publican's business in the defendant's house in Douglas Street, up to the present time, was unauthorized and illegal. If certiorari had been applied for within the period of six months from the transfer, the King's Bench would have been bound to quash it. I do not refer to the transfer having been granted before instead of after the agreement. It is a circumstance which, having regard to the necessity of an agreement such as the present in restraint of trade being founded on valuable consideration, presents much difficulty in the case, but I do not refer to it because the case involves matter far transcending that in importance. The agreement before the transfer, viz., that with Healy, and the agreement after the transfer, that with the defendant, appear to treat the transfer of a licence for one house to another as a matter of course, and, strangely indeed, greatly reflecting on the administration of the licensing laws in the city of Cork, intermediately between the two agreements the transfer contemplated by them, wholly unauthorized, absolutely without jurisdiction, absolutely void, conferring no right, in my mind nothing more than waste paper, is obtained from the judicial authority. Was this usual in the city of Cork ? Of this we know nothing. There is nothing in the evidence showing how this was obtained.

This agreement then proceeds to recite that the plaintiffs had

agreed to defendant's request on her undertaking to pay £300 to be secured by bond and warrant, and of her agreeing as hereinafter contained. The terms of the agreement are of vital materiality. Mrs. Crean agrees that she will forthwith take all necessary steps to have the said licence transferred to her own name *and to the said house* No. 3 Douglas Street, that is, she agrees to do an absolutely illegal act. She further agrees that, when transferred, she will duly maintain it and renew it—another illegal act, and "shall immediately endorse and hand over the licence to the plaintiffs to be from henceforth held and retained by them for the purpose of having same transferred *to such other* person *and house* as shall be named by the directors as hereinafter provided, and shall for such like purpose, from time to time, as the licence shall be renewed, deposit every renewal thereof with the plaintiffs, and shall do all acts and deeds necessary to have the licence transferred to the name of any person or *for any other house*, as the directors shall nominate or direct"; and then there is the covenant sought to be enforced by injunction, that she will while licensed, which in this context means whilst permitted by the plaintiffs to sell under the alleged licence, deal exclusively with them for all porter, and, so long as they shall brew and vend stout, for all stout which she shall sell on said premises or elsewhere under colour of the licence; and, lastly, there is a covenant by plaintiffs for the return to the defendant of the £300 in certain events.

In my judgment it is clear that the effect of this agreement is to provide for the carrying on of the publican's trade under a document purporting to be a licence, but which in truth is waste paper—that is, to carry it on without a licence, with an obligation on the defendant, at the plaintiffs' request, to transfer the licence to any house directed by them. Such an agreement is, in my opinion, illegal and incapable of enforcement. If there had been any valuable consideration for it, it consists in assistance in procuring a void licence by producing a document to the licensing authority, and thereby persuading it to purport to transfer it without authority from one house to another house, and thus to procure a licence for such other house without an inquiry as to the number of public-houses in the neighbourhood.

Thus I am of opinion that the illegality pervades the entire

Appeal. 1914.

JAMES L. MURPHY & Co., LTD. v. CREAN.

Palles C.B.

agreement, both consideration and promises. It appears on the face of the document, and consequently need not have been pleaded.

The answer to Mr. Ronan's argument that the clause of the agreement sought to be enforced is legal, and that, where the consideration is not illegal, if there be two promises, one legal and the other illegal, the former can be enforced (which, of course, assumes the consideration to be legal, and therefore, in my opinion, is inapplicable), is that the two promises are not independent. The promise sought to be enforced here is that the porter and stout *which are to be illegally sold in the house* are, with a view to their being so sold, to be purchased from the plaintiffs, and a decree which would enforce that term would necessarily involve a direction that the illegal trade should be carried on.

Ritchie v. *Smith* (1) is one of several authorities which demonstrate the illegality of the agreement as a whole. That was an action on an agreement whereby the plaintiffs agreed to let to one Newman, *inter alia*, a spirit shop or tap, part of Fendall's Hotel and Coffee House, at the weekly payment of £4, and whereby Newman agreed with the plaintiff to carry on the business of the tap, and to purchase all the porter, ale, and other malt liquors he might sell therein, from Messrs. Kempson of the Mortlake Brewery, and the defendant agreed with the plaintiff that if Newman made default in the performance of the agreement he (the defendant) would pay the plaintiff £200 as liquidated damages. The declaration averred several breaches. The third plea alleged that the agreement was entered into for the express purpose of enabling Newman to sell for his own use excisable liquors by retail to be consumed on the premises without being duly licensed. It appeared at the trial that Newman carried on the business under the supposed protection of the hotel licence, the whole premises being contained in the one licence. A verdict for the defendant was obtained on the third plea, and the case came before the Court upon an application for a new trial or for judgment non obstante veredicto. Chief Justice Wilde, in giving judgment, says:—"It seems to me that the jury could

(1) 6 C. B. 462.

not possibly have come to any other conclusion," and then proceeded to consider the second part of the rule, which had been argued upon the ground that the plea did not disclose any matter which rendered the agreement illegal. "It is said," says the Chief Justice "that, though the agreement was entered into for the purpose of *enabling* Newman to do this, it did not of necessity follow that he *would* be guilty of any infraction of the law. But I think it is impossible to look at this agreement without seeing that the parties contemplated the doing of an illegal thing, in the infraction of a law enacted, not simply for revenue purposes, but for the safety and protection of the public morals." All the Court—Coltman, Maule, and Williams JJ.—agreed. Maule J. said:—"Although, in terms, the agreement is *enabling* only, and the act contemplated to be done is not, expressly and in terms, prohibited by the statute, I think there can be no doubt that it was an illegal act, and that the agreement is void. It is said that there is no authority that goes precisely that length. But it appears to me that the cases as to matters contrary to public policy do directly apply. If two parties enter into an agreement whereby it is stipulated that one of them shall be enabled to commit an act that is contrary to public policy, and contrary to the provisions of an Act of Parliament, though not expressly prohibited thereby except by the imposition of a penalty, I apprehend the agreement is clearly illegal and void. But I do not think it necessary to enter into that question here; for I am clearly of opinion that an agreement having for its object the contravention of the excise laws is illegal."

It will be observed that there was no inquiry in that case whether the parties believed that the business could be lawfully carried on under the old hotel licence. So, too, here the belief of the parties in the legality of the transaction is immaterial.

I agree that the defendant should bear her own costs of suit of the hearing before the Master of the Rolls. She was as much a party to the illegality as were the plaintiffs; but I think her costs of appeal should be paid to her by the plaintiffs.

Appeal.
1914.

JAMES L. MURPHY & Co., LTD. *v.* CREAN.

HOLMES, L.J.:—

The foundation of this action is a contract or agreement made between the plaintiff company and the defendant, and dated the 5th July, 1892. Several defences have been relied on, but I propose to deal with only one of them. The most important of the others turn more or less on questions of fact as to which I am disposed to take the same view as the Master of the Rolls, who heard the witnesses; but having come to the conclusion that the contract is illegal in such a way as to prevent its being enforced in law, I propose to rest my judgment on that point alone.

In 1890, the defendant was married to Mr. Crean, who had a leasehold interest in the premises No. 3 Douglas Street, Cork; and two years later, she and her husband arranged that she would commence to trade as a publican in her own name in those premises. The house had not been previously licensed, and all that the law required was for her to go into occupation of the premises, if she had not already done so, and to have applied in the prescribed manner at the October licensing sessions for a publican's license. If this were granted to her, and she conducted the premises properly, she could carry on the business as long as the licence was renewed in every subsequent October. There was, however, one difficulty which a new candidate for a licence often found it hard to overcome. Although in the law at that date there was nothing to prevent the Bench from licensing a house previously unlicensed, there were many counties in which the magistrates at sessions refused the licence applied for on the ground that there were at the time too many licensed premises in the locality or neighbourhood. To remove this objection, it was not unusual for the applicant to purchase the licence of a neighbouring house, and to undertake that he would allow such licence to lapse at the licensing sessions then being held. This was a clumsy, and in many respects an unsatisfactory, mode of carrying out the licensing law; but it could, I think, be done legally, and I have no doubt it often was done successfully. The defendant determined to try it; but probably a want of money caused her to apply to the plaintiff company to assist her. A publican called Joseph Healy was

licensed for the sale of wine, beer, and spirits, in a house known as 32 Blarney Street, more than a mile distant from Douglas Street, in the city of Cork. The plaintiffs carried on the business of brewers; and, at the request of the defendant, they opened negotiations for the purchase of the licence for the purpose of putting it at the disposal of Mrs. Crean, so as to extinguish it as a condition to her obtaining a licence for 3 Douglas Street. The plaintiffs paid Healy £160 for the licence, and having thus got possession of it, the only purpose for which they could use it would be to hand it over to the defendant so as to assist her in obtaining a licence for the Douglas Street house. Contemporaneous documents describe it as a transfer of the licence from 32 Blarney Street to 3 Douglas Street. There was really no such thing known to the law; but the practice was so usual, and so much had the term "transfer" dominated the licensing sessions, that the defendant obtained a certificate of the transfer to her of the licence lately held by Joseph Healy, which on the 6th October, 1892, was confirmed at the Cork annual licensing quarter sessions.

The plaintiffs were not actuated by benevolence in assisting the defendant thus to become a licensed publican. Their object was to make the defendant a customer to their brewery, and the contract or agreement to which I have referred was entered into between them. It bears date the 5th July, 1892, and it recites that the plaintiffs are the beneficial owners of the licence for the sale of beer, wine, and spirits, under which Joseph Healy hitherto carried on the trade or business, and that Hannah Crean has requested the plaintiffs to allow her to apply for a transfer of the licence of the said house to her own name, and to sell thereunder, to which they have consented and agreed, on her undertaking to pay them the sum of £300, for securing which she has contemporaneously executed to them her bond, with warrant of attorney for confessing judgment thereon, in the sum of £600, and of her agreeing as follows:—"now the said Hannah Crean on her part agrees to and with James J. Murphy & Co., Limited, that she will forthwith take all necessary steps to have said licence transferred to her own name and to said house, 3 Douglas Street, aforesaid, and when it shall have been transferred

Appeal.
1914.
JAMES L. MURPHY & Co., LTD. *v.* CREAN.
Holmes L.J.

she will duly maintain the licence in full force and effect, and will at the proper period in the year renew the same, and pay the duty chargeable thereon, and that the said Hannah Crean shall and will immediately endorse and hand over unto and deposit said licence with the said company, to be from henceforth held and retained by them for the purpose of having same transferred to such other person and house as may be named by the directors of the said company as hereinafter provided for, and for such like purposes shall and will from time to time, as said licence shall be renewed, deposit every renewal thereof with the said company; and further that the said Hannah Crean shall, whenever thereto required by the directors for the time being, or any of them, by notice in writing, withdraw the entry then standing in her name from the books of the Inland Revenue, and do all acts and deeds necessary to have the said licence transferred to the name of any person or persons, or for any other house, as the said directors shall nominate and direct by writing, and if the said Hannah Crean shall fail or refuse, decline or neglect to sign such transfer, or to do any act which may be necessary for transferring the said licence from the name of her the said Hannah Crean, into the name of such other person as the said directors of the said company shall so nominate or appoint, and also to withdraw the entry of the said Hannah Crean with the excise," then a power of attorney was given to the company to do all these acts in the name of the defendant.

It is unnecessary for me to read any more of the agreement, as I think I have done enough to show that the object of the document is to alter in the most essential particulars the licensing law.

It is obvious that what lies at the root of the licensing laws is that the licence, and the premises in which the sale of intoxicating liquor is to be carried on, should be held together; the licensed publican who is to be responsible for the conduct of the house must retain the custody and control of the licence, and any agreement entered into for the purpose of attempting to make some other person the owner of the licence is obviously

illegal. Under these circumstances, I have come to the conclusion that this action cannot be maintained, and I agree that the appeal should be allowed.

Appeal.
1914.

JAMES L. MURPHY & Co., LTD. *v.* CREAN.

Holmes L.J.

Solicitor for the plaintiffs: *Barry C. Galvin.*
Solicitor for the defendant: *Maurice Healy.*

R. ST. J. C.

In re A SOLICITOR.

Lord Chancellor.
1915.
March 6.

Solicitor—Professional Misconduct—Using Testimonials from Judges to obtain Business—Committee of Council of Incorporated Law Society—Nature of Proceedings before, on Charge of Professional Misconduct—Destruction of Material Documents—Contempt of Court—Solicitors (Ireland) Act, 1898 (61 & 62 *Vict. c.* 17), *ss.* 34, 35.

It appeared from a report of the committee, appointed under the Solicitors (Ireland) Act, 1898, of the council of the Incorporated Law Society, that A, a solicitor practising in Dublin and Belfast, with a view to obtaining business from an insurance company, some of which business would in all probability take place in the courts of the Recorders of Dublin and Belfast, wrote to the manager of the company, enclosing copies of testimonials from the Recorders of those cities testifying to A's professional ability. These testimonials had been obtained by A for the purpose of an application by him for an appointment. The testimonial from the Recorder of Dublin contained the statement, "He [A] now practises before me regularly." In the testimonial from the Recorder of Belfast, it was stated that A had acted as his registrar for a number of years, and had resigned to his regret, and that he continued to act as his solicitor.

Held, that the use by A of these testimonials for the purpose of obtaining business, which business might lead him to practise before the Recorders of Dublin and Belfast, amounted to professional misconduct.

After an application had been made to the committee appointed under sect. 34 of the Solicitors (Ireland) Act, 1898, of the Council of the Incorporated Law Society, to hear a charge of misconduct against a solicitor, and before the report of the committee had been presented to the Lord Chancellor, the solicitor destroyed the documents on which the charge of misconduct was founded.

Semble, this amounted to contempt of Court.

The nature of proceedings before such committee considered.

Motion.

This was an application on behalf of the Incorporated Law Society of Ireland to the Lord Chancellor to make such order as he should think fit upon the report of the committee of the council of the Society appointed under sect. 34 of the Solicitors (Ireland) Act, 1898.

The report set out the following matters:—

An application dated the 30th day of November, 1914, was made by Gerald Byrne, of 7 Lower Ormond Quay, in the City of Dublin, Solicitor (hereinafter called "the complainant"), that a solicitor (hereinafter called "the respondent") might be required to answer the allegations contained in the affidavit of the complainant which accompanied the application, and that his name might be struck off the roll of solicitors of the Supreme Court, or that he might be suspended from practice as a solicitor, or that such other order might be made as the Court should think fit, on the ground that the matters of fact contained in the affidavit constituted professional misconduct on the part of the respondent in his capacity of solicitor of the Supreme Court in Ireland.

The committee heard the application on the 15th and 21st days of January, 1915. Mr. Serjeant Matheson K.C., and Mr. E. S. Murphy (instructed by Messrs. J. & J. Galloway) appeared for the complainant, and Mr. Hanna K.C. (instructed by the respondent) appeared for the respondent.

The charges made in the affidavit of the complainant were as follows:—

In particular: That the respondent wrote a letter dated the 26th October, 1914, to the Irish Vehicle Owners' Accident Company, Dublin, clients of the complainant, enclosing copies of testimonials believed by the complainant to have been procured by the respondent for the purpose of seeking an appointment, and not for the recommending of his professional services to persons or firms. That it appeared from the said letter and its enclosures that the respondent desired to procure business by volunteering his services, and that the testimonials had been put together with the object of sending them to persons and firms to whom the respondent volunteered his services.

Generally: That the respondent had been guilty of professional misconduct—(*a*) by "touting" for business and volunteering his professional services to insurance companies and other persons and firms, and (*b*) by using testimonials, given for a different purpose, to recommend himself to persons to whom he had volunteered his services.

Lord Chancellor. 1915.

In re A Solicitor.

The committee reported as follows :—

"The complainant is a solicitor, practising at 7 Lower Ormond Quay, in the City of Dublin. The respondent is a solicitor, and was admitted in Hilary Sittings, 1895, and practises in the City of Belfast and in the City of Dublin . . .

"The complainant made the application to the committee at the request of the Incorporated Law Society of Ireland. The complainant is a member of the committee. He has not taken any part as a member of the committee in the consideration of the application, nor was he present at any meeting of the committee at which the application was before the committee, except when he appeared upon the 15th and 21st days of January, 1915, in his capacity of complainant and witness.

"The respondent, acting as solicitor for the White Cross Insurance Association, Limited, in respect of a claim by a party insured in that company against a party insured in the Irish Vehicle Owners' Accident Company, Limited, had the following correspondence with the secretary of the latter company, in September and October, 1914." [The correspondence was set out in the report, the transaction being concluded by a letter of the 26th October, 1914, by which the respondent accepted a sum of money in settlement of the claim.]

"On the same day [the 26th October, 1914] the respondent wrote to the Irish Vehicle Owners' Accident Company, Limited, another letter, marked 'private,' stating that he was solicitor for thirty-two insurance companies, and that when he found that any other company was involved he always made it a point to save the respective companies from litigation, and the letter concluded with the following paragraph :—'Take a look at the enclosed and return to me ; they will give you some idea of the man you are corresponding with.' The enclosure referred to in this letter is prefaced by a statement (affixed to which is a photograph of the respondent . . .) that the respondent was Alderman of the County Borough Council, Belfast, Justice of the Peace, Chairman of Law Committee, Tramways Committee, a member of certain other public boards, and that he was solicitor in Ireland to the Official Solicitor, England, to the Board of Trade (Companies Dept.), to the Official Receiver in Bankruptcy, to the Public

Trustee, to the King's Proctor, to the Iron Trades Association, the Employers' Federation, to Lloyd's, and to all the largest insurance companies. The document then sets out copies of testimonials (but without dates) received from three judges of the High Court and the Recorder of Dublin and the Recorder of Belfast, and concludes with a list of thirty-seven insurance companies stated to have been employing the respondent."

[The testimonials from the Recorders of Dublin and Belfast testified to the professional ability of the respondent. That of the Recorder of Dublin contained the statement, "He now practises before me regularly, so that I can speak with an intimate knowledge of his capabilities." In the testimonial of the Recorder of Belfast there was a statement that the respondent had acted as his registrar for a number of years, and had resigned that office, much to his regret, owing to increasing business, adding, "He continues to act as solicitor for myself and my relatives."]

"The Secretary of the Irish Vehicle Owners' Accident Company did not reply to the letter of the respondent referred to in the preceding paragraph, but placed the letter and its enclosure upon the file of papers in the case, and sent the file to the complainant, who had been advising the company in the case, but not to the knowledge of the respondent. The complainant is and has been for some years past the solicitor in Ireland for the Irish Vehicle Owners' Accident Company, Limited, and the respondent admitted that when he wrote the letter of the 26th October, 1914, he was aware of this fact."

[The report further set out that the respondent had sent copies of the above-mentioned testimonials to the Dublin manager of the Commercial Union Assurance Company, for which company the respondent had acted as solicitor in Ulster in workmen's compensation cases. It also set out other matters not material for the purposes of the present report, being connected with a general charge of touting, which the committee held not to be substantiated.]

"The respondent stated that he obtained from the three judges of the High Court their testimonials in support of his application for the position of Crown Solicitor of County Antrim and the City of Belfast in the year 1905. He further stated that

Lord Chancellor. 1915.

In re A Solicitor.

in September, 1914, he obtained from the Recorders of Dublin and Belfast their testimonials for the purpose of an intended application for the Office of Clerk of the Crown and Peace for the County of Antrim and the City of Belfast, but for which position he stated he did not apply, because, after making inquiries, he found that the remuneration was not as large as he was led to believe, and it was not worth while his applying for it.

"The respondent having received the copy of the affidavit of the complainant on the 1st of December, 1914, came up to Dublin on the following day. He stated that on the evening of the 3rd of December in Dublin he destroyed the original testimonials and documents . . . and that on the following day, the 4th of December, he swore his affidavit in reply. The Committee thus were improperly deprived by the respondent of an opportunity of inspecting the original testimonials or of ascertaining the dates of them.

"The complainant, in the course of the hearing before the committee, also challenged the right of the respondent to style himself Solicitor in Ireland to the Official Solicitor, England, Solicitor in Ireland to the Board of Trade (Companies Dept.), Solicitor in Ireland to the Official Receiver in Bankruptcy, Solicitor in Ireland to the Public Trustee, Solicitor in Ireland to the King's Proctor, Solicitor in Ireland to the Iron Trades Association, the Employers' Federation, to Lloyd's, and to all the largest insurance companies; and the complainant had served notice on the respondent to produce the original retainers from these officials, departments, and companies. The respondent did not produce any such retainers, and endeavoured to justify his assumption of the title of solicitor in Ireland to the public officials and departments named, by the fact that he had been employed occasionally by all of them to do legal work in Ireland; that any work the English Public Trustee has in Ireland comes to him through the English solicitor of the Public Trustee, and that he does the entire work of the English King's Proctor in Ireland. The respondent did not satisfy the committee in any instance that he was justified in styling himself the solicitor in Ireland to any of the officials or departments or companies named.

"In his affidavit the complainant challenged the right of the

respondent to style himself a justice of the peace. The respondent in his evidence admitted that he was not a justice of the peace, but stated that he had been an alderman of the City of Belfast for the past six years, that it was usual for an alderman of Belfast to obtain the commission of the peace, and that he had been recommended for it. He stated he had not taken out the commission of the peace, because he found that doing so would have prevented him from practising before the local Courts. The respondent is not a justice of the peace, and was not a justice of the peace when he so described himself in the documents sent by him to the Irish Vehicle Owners' Accident Company, Limited, . . . The committee are of opinion that the assumption and use by the respondent of the title of justice of the peace, without having obtained the commission of the peace, was improper and unprofessional.

"As to the charges of volunteering his services, or 'touting' for business, the committee are of opinion that, though denied by the respondent, it was for the purpose of seeking the Dublin accident business of the Irish Vehicle Owners' Accident Company, he sent to that company the letter of the 26th October, 1914, marked 'private,' and the enclosure; that he did so knowing the complainant was the solicitor for the company; and the committee are of opinion that his conduct in this respect was unprofessional. The committee, however, . . . are of opinion that evidence has not been brought before them sufficient to substantiate the general charge of 'touting' for business by the respondent.

"The committee are of opinion that the respondent was not justified in making use of any of the Judges' or Recorders' testimonials for the purpose of influencing business, and that his conduct in this respect was aggravated by the fact that he accompanied the testimonials by inaccurate representations as to his qualifications. In particular the committee are of opinion that the use by the respondent of the testimonials of the Recorder of Dublin and of the Recorder of Belfast (in both of whose Courts the respondent practises) in order to influence business being given to him by the Irish Vehicle Owners' Accident Company, Limited, Dublin, and by the Dublin Office of the Commercial Union Assurance Company, the conduct of some of which

Lord Chancellor. 1915.

In re A Solicitor.

business would in all probability take place in the Courts of the Recorders of Dublin and Belfast, was improper and unprofessional.

"The committee were referred to the following reports of cases:—*Allinson* v. *General Medical Council* (1); *In re a Solicitor, Ex parte the Law Society* (2); *Re Hill* (3); *Re Weare* (4); and *In Re Four Solicitors* (5).

"The committee find that the respondent has been guilty of conduct unprofessional, and unbecoming of a solicitor, and while having some doubt as to whether such conduct constitutes misconduct within the meaning of the hitherto decided cases, they find that a prima facie case of misconduct has been established against the respondent, and beg to report accordingly pursuant to section 35 of the Solicitors (Ireland) Act, 1898."

Serjeant Matheson K.C., for the Incorporated Law Society:—

In *Allinson* v. *General Council of Medical Education and Registration* (1), a definition was given of what amounted to "infamous conduct in a professional respect in the case of a medical man." If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect.'" That definition was applied in *In re A Solicitor* (2) to professional misconduct on the part of a solicitor. It is submitted that in the present case the conduct of the respondent would be reasonably regarded as disgraceful or dishonourable by his professional brethren.

Hanna K.C., for the respondent:—

The matters mentioned in the report do not amount to professional misconduct on the part of the respondent. The committee

(1) [1894] 1 Q. B. 750.
(2) [1912] 1 K. B. 302.
(3) L. R. 3 Q. B. 543.
(4) [1893] 2 Q. B. 439.
(5) [1901] 1 Q. B. 187.

in their report have refrained from describing the respondent's conduct as "disgraceful" or "dishonourable," the words used in the definition given in *Allinson* v. *General Council of Medical Education and Registration* (1) of "infamous conduct in a professional respect" on the part of a medical man, and applied in *In re a Solicitor* (2) to professional misconduct on the part of a solicitor. In the last-mentioned case the conduct of the solicitor amounted to champerty. There is nothing of the kind in the present case. Here there had been two charges, (*a*) general touting, and (*b*) using the testimonials improperly. There was an acquittal of general touting, and the acts relied upon as misconduct were narrowed to the one incident found in the use of testimonials. These acts did not amount in law to misconduct within the Act. The acts must be in his professional capacity. From an analysis of the cases it would seem that professional misconduct must be something arising (*a*) between a solicitor and his client, (*b*) between the solicitor and the Court, or (*c*) such conduct as amounted either to a criminal offence, or otherwise such as to render the solicitor personally unfit to act as a solicitor in the public interest: *In Weare* (3); *In re Hill* (4); *In re a Solicitor* (2); Lord Halsbury's Laws of England, vol. xxvi, p. 849.

The respondent now sees that it was improper to send out testimonials from judges before whom he might practise, and to describe himself as a justice of the peace. He desires to express his regret for these acts, which were committed merely through thoughtlessness. He desires also to express his regret for having destroyed the original documents. This was done through thoughtlessness, and not with the intention of concealing anything, or interfering with the process of the Court.

O'BRIEN L.C.:—

I do not think it would be right that I should postpone my decision. It would be unfair to the respondent, after publicity has been given to the case, if he had to wait even for a few days with the decision of the Court hanging over him; and I think,

(1) [1894] 1 Q. B. 750.
(2) [1912] 1 K. B. 302.
(3) [1893] 2 Q. B. 439.
(4) L. R. 3 Q. B. 543.

Lord Chancellor. 1915. *In re* A Solicitor.

in his interest and in the interest of the public and of the Incorporated Law Society, that it is better that I should express my opinion now; and I do so, being clear in my view of the matter.

It has been said by my predecessors—and although often repeated, I also wish to say it—that there is no branch of the jurisdiction which is vested in the Lord Chancellor more painful to exercise than that which casts on him the duty of considering the alleged misconduct of a member of that great profession, the solicitors' profession, when the opinion which he has to form may, in some cases, lead to consequences of the gravest importance to the solicitor who is accused of misconduct.

Now, before expressing any view as to the facts of this particular case, I wish to say a few words with regard to the position of an application of this character under the Solicitors (Ireland) Act, 1898; and I do so because I think that this case is an example of how, even amongst solicitors themselves, the nature of the proceeding—its gravity and importance—in so far as it is concerned with the preliminary investigation carried out by the committee of the council of the Incorporated Law Society under their statutory jurisdiction, is not in all respects realized. Prior to the passing of the Solicitors Act the jurisdiction to consider the alleged misconduct of a solicitor was vested, without the intervention of any body, in the Lord Chancellor and judges; and it was considered, and wisely considered, that, while the jurisdiction should be retained, not only in the interest of the public but in the interest of solicitors—because it is always desirable that there should be a judicial authority to decide those questions—while it was considered desirable to retain the jurisdiction, there was interposed in most cases, though not in all, between the allegation of misconduct and the final determination, certain essential statutory procedure. The committee is appointed under sect. 34 of the Act of 1898, consisting of members of the Incorporated Law Society approved by the Chancellor; and it is their absolute duty to consider any charge of professional misconduct which is properly brought before them, and they have to do it whether it is pleasing or not. No task could be more displeasing to anyone than to have to sit in judgment upon the misconduct of his professional brethren, or one of them. But the Incorporated

Law Society and the committee have no option. They have to discharge a public and unpleasant duty, and that duty requires them to consider whether or not there is a prima facie case made against the solicitor who is charged with misconduct; and if they are of opinion that there is a prima facie case, "it shall be the duty of the society to bring the report of the committee before the Lord Chancellor." In the exercise of this jurisdiction in the past, anyone who has known the working of the Incorporated Law Society must have been struck with the scrupulous impartiality and the great sense of public duty which have characterized their decisions and actions in those cases. In the present instance they have moved because they considered that in the interests of the public and of the profession they should move, and if they have erred—and I do not say that they have—they have erred in this case on the side of leniency; and that is not a matter that should in any case be the subject of adverse comment in regard to them, because a charge of this kind is so serious that even the principles applicable to criminal charges which require the benefit of the doubt to be given to the person charged, may in fairness have to be applied. When the report is made, that report "shall be treated by the Lord Chancellor in the same manner as a report of a Master of the High Court." Now, this committee is not, as it was described during the argument, and as it is sometimes described, a mere committee of a society established to regulate the internal affairs of the society. It is a statutory committee whose deliberation and report are made an essential preliminary proceeding to the exercise of the jurisdiction of the judicial authority, and the proceeding before it is, in my judgment, not only part of the proceedings preliminary to the application in Court, but in itself a proceeding of the Court, none the less so because the Chancellor is not present. And accordingly I was surprised to learn in this case that what to my mind was a far more serious thing in some respects than the charges which were made, appears to have taken place. Documents on which the whole charge of misconduct was founded, and which were essential for the determination of the question before the committee and essential for the determination of the question before me, were destroyed by the respondent in the course of the proceed-

Lord Chancellor. 1915.

In re A Solicitor.

ings. I do not wish, as it has not been argued, to express a definite view that this amounts to a contempt of this Court, though my impression undoubtedly is that it does, because I think it took place during proceedings which were, in substance and in fact, part of the proceedings before this Court. If it were otherwise, the Incorporated Law Society Committee would be deprived of powers which it was undoubtedly intended to give them, of seeing that all evidence necessary for the purpose of determining the question before them was collected and preserved to be laid before the Lord Chancellor. I, however, in this case, accept the apology which has been made by the respondent with regard to the matter. I think that he acted thoughtlessly, and I think that he acted without a due appreciation of the character of the tribunal before which he was bound to appear; and my object in referring to it is to emphasize that, in the future, members of the profession must not assume that this is a mere committee in the nature of a committee of a club or a voluntary association; it is a committee which discharges most important functions in a serious judicial proceeding, and it must be treated with the respect which that position requires. As I said, however, I accept the respondent's explanation. I think his action was due to thoughtlessness, and not to any real desire to act wrongly.

I now come to the question which has been argued here, namely, whether, on the particular facts of this case, the respondent has been guilty of what is called professional misconduct. The committee naturally felt a great deal of difficulty in connexion with the matter, and, while expressing their opinion that the respondent had been guilty of professional misconduct, they have framed their report to me in such form that they obviously wish, without pressing unfairly upon the respondent, to obtain some judicial interpretation of the law as governing the facts of this particular case. One of the questions which they have raised I do not think can be the subject of any judgment by me, because I conceive that each case must be judged by its own facts, and that no abstract propositions can possibly be laid down. It is rather suggested in the report, and it was suggested at the Bar by Serjeant Matheson, that the question may arise in the present case for decision whether the mere attempt of a solicitor to

detach a client from another solicitor during the period of retainer may not amount to professional misconduct. Now I am not to be taken as expressing an opinion on that really abstract question. Circumstances alter cases, and what might amount to misconduct in one case might not amount to misconduct in another. But undoubtedly the Incorporated Law Society Committee are, in my opinion, quite right in their view that, apart from the ultimate result, solicitors, in dealing with persons who have already retained other solicitors, must act with great caution, and must not do anything which as between one honourable man and another honourable man, both members of this high profession, would not be considered proper. But, at the same time, it would obviously be going too far to determine, as an abstract proposition, that in every case where there might be some reprehensible professional conduct, this necessarily amounts to that professional misconduct which entails the serious result of being perhaps struck off the roll of solicitors, suspended, or otherwise dealt with by fine. While expressing my general approval of that view, which is taken by the committee of the Incorporated Law Society, I disclaim any intention of deciding any abstract proposition, and only deal with the concrete facts of this particular case.

Now, even if the King's Bench Division in England had not given the decision which it has given in the case of *In re A Solicitor* (1), I should have thought that such a determination must be good law. In giving judgment Mr. Justice Darling and the other members of the Court applied to the decision of *In re A Solicitor* (1) the judgment of Lord Justice Lopes in the case of *Allinson* v. *The General Medical Council* (2). Lord Justice Lopes said :—"Then I come to the question of 'infamous conduct in a professional respect'; and, in my opinion, if there was any evidence on which the council could reasonably have come to the conclusion to which they did come, their decision is final. If, on the other hand, there was no evidence upon which they could reasonably arrive at that conclusion, then their decision can be reviewed by this Court. It is important to consider what is meant by 'infamous conduct in a professional respect.' The Master of

(1) [1912] 1 K B. 302. (2) [1894] 1 K. B. 750.

Lord Chancellor. 1915. *In re* A Solicitor.

the Rolls has adopted a definition which, with his assistance and that of my brother Davey, I prepared. I will read it again: 'If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency,' then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect.'"

The word "infamous" is a word that in modern English imports stronger considerations of condemnation than perhaps it would bear in connexion with the context of the statutes dealing with the functions of the Medical Council; and it is a word that I wish entirely to avoid in connexion with the present case or any other case of this kind. The phrase is "misconduct," in the case of a solicitor; and the general definition of disgraceful or dishonourable conduct on the part of a doctor in regard to his professional brethren, applies, in my opinion, just as much in the case of a solicitor as in the case of a doctor. To that extent I wish to give my opinion, be it right or be it wrong, clearly, and without doubt and without hesitation. The case of *In re A Solicitor* (1) was sought to be differentiated on the ground that there was there, in connexion with the act of the solicitor, what would have amounted to the common law offence of champerty. But I do not read the case as limiting the adoption of that definition in any way by reason of that fact.

Now, the real offence which is charged here is with reference to a letter which was written by the respondent on the 26th October, 1914. It is marked "private," and it was sent to the Irish Vehicle Owners' Accident Company in College Green. I should say that what is popularly described as the offence of "touting" was charged against the respondent here; and the Incorporated Law Society find that there is no evidence against him on which they should hold that he was guilty of any such offence as touting, and he is entitled to have that emphasized in his favour. The other charge, however, which the Incorporated Law Society insists amounts to professional misconduct, arises not

(1) [1912] 1 K. B. 302.

so much in consequence of the letter itself, but in consequence of the suggestion contained in the letter by reason of the incorporation of four documents which were enclosed in it. The letter says: —"Please accept my thanks for your courtesy. I am solicitor for thirty-two insurance companies; and when I find that any other company is involved, I always make it a point to save the respective companies from litigation, and this is always appreciated by my clients. Take a look at enclosed and return to me; they will give you some idea of the man you are corresponding with." A photograph of the respondent was also enclosed. Much of this letter represents a method of advertisement tolerated in other and newer countries; but I think it unhappy, and not deserving of imitation. Nor should I imagine that it is consistent with the view we in this country entertain of the professional status of a solicitor. At the same time opinions may differ with regard to that question; and there is a certain amount of advertisement which a solicitor may consider right to indulge in which might not amount to professional misconduct, although the better feeling of the majority of the profession might greatly condemn it as not being seemly or proper. This case, however, I regret to say, does not, in my judgment, fall within that possible class of case, because I think that the effort to obtain a retainer from this particular company was connected with representations which, on the true facts, were most improper to have been made by the respondent. In the first place, it is suggested as a ground for employing him—because that is what it comes to—that he is a justice of the peace. He is not a justice of the peace, and he never was a justice of the peace. He also suggests that he is the solicitor in Ireland to the Official Solicitor, England, to the Board of Trade (Companies Department), to the Official Receiver in Bankruptcy, to the Public Trustee, and to the King's Proctor. He occupies no such official positions, though it is only fair and just to him to say that the evidence shows that from time to time he has been employed in Ireland as solicitor for one or other of those named public authorities. But that did not justify the representation which is contained in that document that he occupied this position of practically official solicitor to those bodies. That, however, might be passed over but for a

Lord Chancellor. 1915. *In re* A Solicitor.

very serious matter in connexion with two documents which are enclosed. One purports to be a testimonial by the Recorder of Dublin, bearing testimony to the high ability and character of the respondent—a matter that I will, in fairness to the respondent, say something on. That testimonial of the Recorder contains the statement:—"He now practises before me regularly, so that I can speak with an intimate knowledge of his capabilities." That document was not obtained from the learned Recorder for any purpose except in connexion with an application which the respondent was making for some public employment; and to use it for the purpose of obtaining business from even one client, containing as it did the statement that "he now practises before me regularly," to my mind constitutes upon the part of the respondent the very gravest professional misconduct. In addition to that, he utilized a letter which was given to him by the Recorder of Belfast, stating that he continued to act as solicitor for himself and relations, that whilst associated with him as registrar he had the best opportunities of studying his character, and that he was a man of great industry and geniality and so forth. The use of this document is not in itself so reprehensible, as there is no suggestion that he was actually practising before the Recorder. But taking the two documents together, I can conceive them to have been used for no other purpose than to represent to the Irish Vehicle Owners' Accident Company that the position of the respondent, by reason of his relations with the Recorder of Dublin, by reason of his relations with the Recorder of Belfast, and by reason of his relations with the High Court—because there were three testimonials given for another purpose by three judges of the High Court—rendered it desirable in the pecuniary interests of the Company that he should be employed in the conduct of the business which, beyond all doubt, would bring him as a professional advocate before the learned Recorders of Dublin and of Belfast. To use those documents for any purpose other than that for which they were given by those learned judges was not only a matter of bad taste, but it was a matter that, I think, even in itself, verges very closely upon professional misconduct. But to use them for the purpose of obtaining business, which business might lead him to practise before those two judges, was clearly, in

Lord Chancellor.
1915.
In re A SOLICITOR.

my judgment, professional misconduct within the definition which I have adopted.

Having, however, determined the offence of which the respondent has been found guilty, it is most desirable that I should say something with regard to his own position. It is not every fault that a man commits that makes it binding on a Court to inflict severe punishment; and, if the offence has been committed more through thoughtlessness than evil intent, that not only must be considered by the Court, but effect must be given to that consideration. Now I accept the statement which has been made here on his behalf by Mr. Hanna, whose skilful and judicious management of the case has largely impressed me, that the offence arose from thoughtlessness and not deliberate malice, and that the solicitor regrets what he did. Accordingly, the order I will make is one of leniency. That the respondent seems to be a gentleman of great ability—exceptional ability—exceptional industry, exceptional anxiety to do the work which his clients give to him, is manifest from the documents which are before me. But that in itself makes it more deplorable that he should have yielded, in his anxiety to procure more business, to methods which have to be condemned. I think it is a pity, because I am perfectly satisfied that a little less haste, and a little more consideration for the ordinary methods by which solicitors obtain business, would have produced, as they will produce in any man of great ability such as the respondent, in their own due time a proper result. So that I think it is particularly deplorable that he should have been tempted into the course which he took. But I entirely absolve him, on the evidence before me, from any intention of deliberately doing what he thought amounted to professional misconduct. I do not think that he did so regard it. I think he was thoughtless and careless, and, if I may so, in consequence of that, foolish; but I do not think that he intended to do an act which, when investigated in the cold light of all the facts, amounts to professional misconduct. So that while I find it necessary to condemn his conduct—a painful duty—I wish on the other hand to be absolutely clear in pointing out that, apart from this, there is no charge against the respondent, and nothing that should or ought affect anyone in employing

Lord Chancellor. 1915. *In re* A Solicitor.

him in any other case where recourse is had to him under the circumstances which ordinarily arise in professional employment. But I cannot entirely pass over the conduct of which, I am sorry to say, I have to find him guilty. I do not think it is necessary, having regard to his standing, his position, and to what I have already adverted to, to make any order that would look in the nature of punishment. I entirely accept the excuses which have been made, but they are only excuses, and, accordingly, I must order that, while making no rule on the application, he must pay to the Incorporated Law Society all their costs and expenses of the proceedings which they have undertaken in connexion with the bringing of the case before this Court. I may be wrong, and I think I can be corrected by a higher tribunal; but I do not think, whatever tribunal the case comes before, that anything will ever be said with regard to the conduct or character of this gentleman further than what I have said, namely, that he foolishly and thoughtlessly did a thing which amounted to professional misconduct, and which, I am sure, no one regrets now more than he does himself.

Serjeant Matheson: The costs before the committee were Mr. Gerald Byrne's costs.

The Lord Chancellor. He must indemnify Mr. Byrne, and the Incorporated Law Society.

Solicitor for the Incorporated Law Society: *W. G. Wakely.*
Solicitor for the respondent: The respondent in person.

J. G. T.

IN THE MATTER OF THE ESTATE OF LORD INCHIQUIN (No. 2) (1).

Appeal.
1914.
Nov. 6, 11

Land Purchase Acts—Compulsory Purchase—Costs of Sale—Discretionary Power to award—Exercise of Discretion—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *s.* 50—*Irish Land Act*, 1909 (9 *Edw.* 7, *c.* 42), *Part IV—Land Commission Rules of March*, 1897, *Order XLVI, Rule* 1.

The Judicial Commissioner, in exercising his discretionary power to grant or refuse to an owner, whose lands have been compulsorily acquired by the Land Commission under the provisions of Part IV of the Irish Land Act, 1909, the costs of the sale as against the Land Commission, is not bound by any overriding principle of law entitling the owner to be allowed such costs in the absence of special reasons for disallowing them.

Appeal by the owner, Lord Inchiquin, from an order of Wylie J. refusing, as a matter of discretion, the application of the owner that the costs of sale properly and necessarily incurred by him in the proceedings herein, incidental to the acquisition of certain of his lands by the Land Commission under the compulsory provisions of the Irish Land Act, 1909, when taxed and ascertained, up to and including all costs of and incidental to the distribution of the purchase-money, be ordered to be paid by the Land Commission.

Lord Inchiquin was entitled as tenant for life in possession to certain estates situated in County Clare. On the 17th April, 1911, the Estates Commissioners wrote to him making a proposal for the purchase, under sect. 6 of the Irish Land Act, 1903, as amended by the Act of 1909, of portions of the estates, consisting of certain tenanted and untenanted lands, comprising the lands of Mooghaun north, containing 228A. 0R. 22P., and Ballygirreen, containing 133 acres, and the lands of Mooghaun south, with part of Ayleacotty, containing 93A. 2R. 2P., all adjoining his demesne of

(1) Before O'BRIEN L.C. and HOLMES and MORIARTY L.JJ.

Appeal. 1914. *In re* LORD INCHIQUIN'S ESTATE (No. 2).

Dromoland, at the sum of £6658. The owner objected to this proposal on several grounds. On the 14th June, 1911, the Estates Commissioners sent two final offers, under sect. 43 of the Act of 1909—one for the purchase of the said lands of Mooghaun north and Ballygirreen, at the sum of £5645, and the other for the purchase of the said lands of Mooghaun south, with part of Ayleacotty, at the sum of £1013. These final offers were not accepted, and were duly published in the *Dublin Gazette*, pursuant to the provisions of Part IV of the Act of 1909. The owner thereupon served two notices of motion, objecting on certain statutory grounds to the acquisition of the lands respectively mentioned in the said final offers. Before these applications came on for hearing, the Estates Commissioners made a new proposal whereby they offered to forego their claim to 86A. 2R. 30P., of the lands of Ballygirreen, and to take instead 296A. 3R. 22P. of the adjoining lands of Ballynacragga, together with the other lands mentioned in the said final offers. They thereupon withdrew the two final offers already published, and on the 17th January, 1912, made a new proposal for the purchase, under sect. 6 of the Act of 1903, as amended by the Act of 1909, of the said lands at the sum of £10,022. The owner objected on the ground of inadequacy of price. On the 27th February, 1912, the Estates Commissioners sent a final offer, under sect. 43 of the Act of 1909, for the purchase of the said lands at the said sum. This final offer was not accepted, and was duly published in the *Dublin Gazette*. The owner thereupon applied to Mr. Justice Wylie to fix the price under sect. 63, sub-s. 1, of the Act of 1909. On the 20th June, 1912, Mr. Justice Wylie fixed the price at the sum of £10,690, and allowed the owner the costs of the application to be paid by the Land Commission. The final schedule of incumbrances was duly vouched. Appearing thereon were two head rents, and a mortgage vested in the Representative Church Body. On the allocation of the purchase-money, the owner claimed that the costs of making title to these, as well as to the residue of the purchase-money, and all costs of and incidental to the compulsory acquisition of the lands by the Estates Commissioners, should be paid by the Land Commission. Mr. Justice Wylie made an order refusing

the application, on the ground of want of jurisdiction. On appeal, the Court of Appeal reversed this order, holding that the Judicial Commissioner had jurisdiction, in the exercise of his discretion, to order the costs in question to be paid by the Land Commission (1). On the matter again coming before Mr. Justice Wylie, he made an order refusing the application, as a matter of discretion, on certain stated grounds. From this order the owner now appealed. The judgment of Mr. Justice Wylie was as follows :—

WYLIE J. :—

In this case the vendor has applied for an order that the costs of sale properly and necessarily incurred by the owner, up to and including all costs of and incidental to the distribution of the purchase-money, be paid by the Land Commission. The ground, and the only ground, on which the application is based is that the sale took place under what are called the compulsory clauses of the Land Act of 1909. When a similar application was first made to me in this case, I was of opinion that I had no jurisdiction to make such an order, on the ground that the Land Commission were, in the discharge of a statutory duty, merely exercising their statutory powers in a legal and proper manner, and that the statute made no provision for payment by them of such costs, but indicated, as I thought, a clear intention to the contrary. The Court of Appeal, however, have held that prior to the passing of the Act of 1909, conferring compulsory powers, I had a general discretionary jurisdiction, under the Land Purchase Acts and rules, over costs in all matters coming before me, which extended to matters coming under this new jurisdiction, and that there was nothing in the Act of 1909 to take away this general discretionary jurisdiction : *In re Lord Inchiquin's Estate* (1).

That being so, I am now asked in the exercise of this discretionary power to make the order applied for in this particular case. The Court of Appeal declined to indicate or

(1) [1914] 1 I. R. 248.

Appeal. 1914.

In re Lord Inchiquin's Estate (No. 2).

express any opinion as to how my discretion ought to be exercised, except that the Lord Chief Baron says that (1), "In my judgment the discretion of the judge is to be exercised in each case according to the circumstances of the case, and I consider that under no circumstances could that discretion be properly exercised if there was an omission to take into consideration the fact that the purchase was compulsory and not voluntary." Now no one could question the correctness of the principle so laid down by the Lord Chief Baron, but it clearly does not mean what, I think, Mr. Jellett tried to read into it, that from the mere fact of the sale being compulsory I ought to grant the application, because that would deprive me of the very discretion which the Court of Appeal has held I possess.

Now, as I have said, Mr. Jellett based his application solely on the ground that the Land Commission purchased the lands under their compulsory powers, and, after referring to the authorities dealing with costs in such cases, asked the question: Is there anything peculiar about compulsory purchase under the Land Purchase Acts? Well, I think Mr. Jellett has discovered ere this some striking peculiarities. I know that owners of land, as well as the Estates Commissioners and the Congested Districts Board, were not long in discovering them.

Let us see how it works. Under the provisions of sect. 42 of the Act of 1909, the Estates Commissioners first try to purchase by agreement under sect. 6 of the Act of 1903, and make an offer for that purpose. That offer would be in 3 per cent. stock. If the owner is not satisfied with the price, or is unwilling to sell, the Estates Commissioners can then make a final offer either of the same or a different sum (s. 43). If the owner accepts the final offer, then the offer and acceptance have the effect of an agreement for purchase under the Act of 1903, as amended by the Act of 1909, with one important difference, that the price offered is paid in cash and not in stock.

The immense advantage of this 43rd section to owners, as well as to the Estates Commissioners and the Congested Districts Board, was soon found out. Let me give a typical instance of

(1) [1914] 1 I. R., at p. 264.

the way in which a sale by agreement now takes place under the Act of 1903, as amended by the Act of 1909. The Estates Commissioners or the Congested Districts Board, during negotiations for purchase by agreement, offer, say £10,000 3 per cent. stock, for an estate. The owner says:—No; the price is not sufficient; the £10,000 3 per cent. stock is only worth to me in cash £8,200, but make me a final offer of £9,000 under sect. 43, and I will accept. So by means of this arrangement for a final offer the owner gets £800 more money, and the Estates Commissioners or the Congested Districts Board purchase for £1,000 less. And this is not the only advantage to the vendor. He gets a larger bonus. Suppose the annual value of the land was £400. If the owner had accepted the original offer of £10,000 3 per cent. stock, being twenty-five years' purchase of the annual value, he would have got a bonus of only 3 per cent. on £10,000, or £300; but by accepting a final offer of £9,000, he gets only twenty-two and a-half years' purchase of the annual value, and therefore a bonus of 8 per cent. on £9000 or £720.

Now, this final offer, if not accepted, is the first step towards compulsion. But the advantages of the system of financing in cash in connexion with compulsion are so marked in favour of both the owners and the purchasing Board that this "final offer" system has now become by arrangement the usual or frequent method of completing a purchase where the price has been really fixed by agreement.

Now, under sect. 43, sub-s. 3, where a final offer has been accepted, the offer and acceptance have the same effect as an agreement for purchase under the Act of 1903, as amended by the Act of 1909, and the like consequences ensue, and the like proceedings are carried on, as in the case of such an agreement. Consequently, there attaches to and flows from this statutory agreement all the consequences and proceedings which, under the Land Purchase Acts, attach to and flow from an ordinary agreement for purchase under the Acts, some of which are the power to vest the lands, to attach claims to the purchase-money, and to distribute it under sect. 24 of the Act of 1903; and it is not denied that in such a case, in the

Appeal. 1914.

In re Lord Inchiquin's Estate (No. 2).

course of such distribution, all the vendor's costs of sale, and all costs of and incidental to the distribution of the purchase-money, are paid out of the purchase-money unless, according to my discretion, I otherwise order.

But the vendor in this matter contends that, where an owner does not accept the final offer under sect. 43 but does not object to it, when the same final offer is made under sect. 61 he then becomes entitled not only to the purchase-money and bonus, but to payment, by the Land Commission or the Congested Districts Board, of all costs and expenses of sale, and the costs of all parties having claims upon the purchase-money incidental to the proving of title to such claims and distribution of the purchase-money. I have said "where he does not object" to the final offer under sect. 43, merely to make the contrast between the two cases more marked, but it must be the same whether he objects or does not object, if the fact that the sale is under the compulsory clauses is to be the sole governing factor in determining the mode in which I should exercise my discretion. Well, the first effect of my deciding that an owner in all compulsory cases is entitled to the costs asked for by this motion would be that no owner, whether anxious to sell or not, would ever accept a final offer under sect. 43, when he could get the same final offer under sect. 61, *plus* all costs.

Now let us consider what the statute says as to how a compulsory purchase is to be carried out. If there be no objection to the final offer under sect. 61, or after the determination of any question raised, the price named in the final offer, or fixed under sect. 63, shall be deemed to be the purchase-money of the estate or untenanted land, and shall be paid into bank, and the purchase shall be completed, and the purchase-money distributed, in like manner, and all the like consequences shall ensue, as if the estate or untenanted land had been purchased by agreement under the Act of 1903, as amended by the Act of 1909, upon the date of the payment of the money into bank. Now, what is the effect and meaning of that section? It was suggested, I understand, in the Court of Appeal, that it was merely intended to fix the date of the agreement. The date of what agreement? There was no agreement of any kind. That is the assumption under-

lying the section, and the draftsman, knowing that all the provisions of the Land Purchase Acts were expressly concerned with and based upon agreements for purchase, carefully provided that upon the payment of the purchase-money into bank, the purchase should be completed and the purchase-money distributed in like manner, and all the like consequences should ensue, as if the estate had been purchased by agreement of a particular date. Without this statutory declaration it seems to me the Land Commission could not have made the statutory vesting order under sect. 16 of the Act of 1903, nor would the claims upon the land have attached to the purchase-money, nor would sects. 18 and 24 of the same Act have applied to the case. The statute, therefore, seems to me to show that the intention of the Legislature was that up to the stage of the final offer, and after the compulsory steps were over and the money paid into bank, everything should be carried on as in the case of an ordinary voluntary agreement. But this view does not affect my general discretionary jurisdiction over costs, because that jurisdiction applies equally whether the sale is voluntary or compulsory.

Now if the fact that the sale was compulsory is not of itself sufficient to compel me to order the Land Commission to pay these costs, is there anything else in the case, coupled with that fact, that should lead me to make that order? There has been no suggestion that the Land Commission exercising their statutory powers in this case have been guilty of any harsh or oppressive action. There has been no evidence given that the lands taken had any special value to the owner in connexion with his demesne or other lands in his occupation, or that he was in any sense an unwilling vendor if he got a satisfactory price. Indeed, the history of the lands would indicate the contrary. Most of them were lands which had been in the hands of judicial tenants, who were evicted in 1892 for non-payment of rent when greatly in arrear. They are just such lands as an ordinary owner would desire to sell. The price has been the only question in dispute. No doubt the owner was not allowed to fix it himself. If he had fixed it by agreement, he would have had to take it in 3 per cent. stock at par; and, as I have shown, the Estates Commissioners could not have afforded to give him as large a price under a

Appeal. 1914.

In re LORD INCHIQUIN'S ESTATE (No. 2).

voluntary agreement as they could under the compulsory clauses. I fixed the price myself after a long and careful hearing, and raised the final offer from £10,022 to £10,690. In my opinion, the owner has got the full value of his land, and has obtained a price he could never have realized by a voluntary sale. In my opinion, there is no equitable ground for giving the owner the costs applied for, and if I were to hold the Land Commission responsible for these costs in such cases, except on special grounds which do not exist here, I should be acting in contravention of the intention of Parliament as shown by the Land Purchase Acts.

It is, I think, a striking fact, though I have not in any way based my decision upon it, that the Legislature deliberately omitted from sub-s. 3 of sect. 63 of the Act of 1909, the clause contained in the corresponding sub-s. 3 of sect. 5 of the Evicted Tenants Act, 1907, in respect of these costs.

W. M. Jellett K.C. and *J. E. Walsh*, for the appellant :—

The Court will review an order made in the exercise of a discretion as to costs where it is shown that the judge exercising the discretion has acted on wrong grounds: *Whitmore* v. *O'Reilly* (1). But apart from that, a right of appeal is expressly given by sect. 24, sub-s. 13, of the Act of 1903 from any decision given under that section. Many of the decisions given under that section are made in the exercise of a judicial discretion. The order appealed from was a decision under that section, made on the distribution of the purchase-money pursuant to the provisions of sub-s. 6.

In exercising his discretion, Mr. Justice Wylie has proceeded upon an assumption of fact as to what happens in some cases, but which has not been established and has no existence in the present case, and, so far from giving any weight to the element of compulsion, has treated the case as if it were a voluntary sale. On the evidence now before the Court, the proceedings were initiated and carried through against the will of the owner. That would have been a natural inference from the fact that the lands acquired immediately adjoin the owner's demesne, and that

(1) [1906] 2 I. R. 392.

most of them were in hand and were used as a valuable adjunct to his home farm, although Mr. Justice Wylie has drawn the opposite inference. The suggestion that the question as to whether the purchase-money is to be paid in cash or stock is an element that can be taken into consideration in exercising a judicial discretion as to costs, is to imply that the owner's right to costs is in some way dependent on the price of securities in the stock market, although the statute itself fixes the mode of payment. If it is a legitimate consideration, the discretion based upon it is invariably exercised the other way, *i.e.* in favour of the owners of superior interests and incumbrancers, whose claims are always paid in cash. Mr. Justice Wylie himself fixed the purchase price at a sum representing the fair value of the lands to the owner, in accordance with the provisions of the statute, and, as a ground for exercising his discretion, expresses the opinion that the owner has got the full value of his lands. How can the owner be said to have got the full value, if, in fact, all that he gets is the sum representing the fair value less by the amount of the costs of sale, including the costs of superior owners and incumbrancers?

Once the compulsory stage is reached, in considering the element of compulsion, Mr. Justice Wylie places the owner who does object to the final offer in the same category with the owner who does not object. In exercising his discretion, no doubt the learned judge is entitled to inquire into the bona fides of the transaction, and to satisfy himself that the proceedings throughout are in fact, as well as in form, compulsory; but we submit that, once he has satisfied himself that it is a case of bona fide compulsion, so far as the owner is concerned, he is bound to exercise his discretion by allowing the owner his costs, unless there appear to him to be special grounds for disallowing them. The best test of bona fides here was that, on the appeal, which could only be taken under the compulsory provisions of the Act, the purchase price of the lands was raised by £668.

The principles on which the Court will exercise its discretion as to costs in compulsory cases are well settled. In *Ex parte Vicar of St. Sepulchre's* (1) the Vice-Chancellor says (p. 464):—

(1) 32 L. J. Ch. 463.

Appeal. 1914.

In re Lord Incriquin's Estate (No. 2).

"The abstract justice of the case is, that where individuals are liable to have their property taken for public purposes, it must be presumed that they are entitled to be paid all expenses which are entailed upon them by such taking, otherwise the greatest injustice might be done." And in *In re Lord Leconfield's Estate* (1), Mr. Justice Bewley says (2):—"The case of *In re Bethlehem Hospital* (3), and other cases, appear to me to establish that where any discretion exists as to costs, a party whose property is taken compulsorily is entitled to be indemnified against any costs properly and necessarily incurred by him, including the costs of obtaining payment of the purchase-money or compensation awarded in respect of such property. This right, in my opinion, is founded on principles both just and reasonable." These principles are recognized by Order XLVI, rule 13, of the rules of March, 1897, made by the Land Commission in the exercise of their discretion, and providing that, "Every owner of a superior interest and every incumbrancer shall have, with his demand, his costs properly incurred, unless the commissioner shall otherwise direct." The jurisdiction to make that rule was derived from sect. 50 of the Act of 1881. In *In re Lord Inchiquin's Estate* (4), in dealing with the question of jurisdiction, the Lord Chancellor says (p. 259)—"To say that you are to draw a distinction between the compulsory acquisition of a superior interest (which really may be an estate in land of enormous value) and the compulsory acquisition of the land itself, and that there is jurisdiction to award costs to the owner in the one case, and not in the other, although the power arises only under the one section and general order, is an argument I cannot acquiesce in." If the discretion arising from the jurisdiction given by sect. 50 is exercised according to well-recognized principles in the case of the compulsory acquisition of superior interests and incumbrances where the claims are satisfied in cash, irrespective of whether the owner of the lands is paid his purchase-money in cash or depreciated stock, it is only right and just that the discretion arising from the same jurisdiction should be exercised according to the same principles in the case of compulsory acquisition of the land itself. We

(1) 25 I. L. T. R. 28.
(2) *Ibid.*, at p. 31.
(3) L. R. 19 Eq. 457.
(4) [1914] 1 I. R. 248.

submit that on the facts of the present case, the reasons given by Mr. Justice Wylie are irrelevant to the proper exercise of a judicial discretion, and *a fortiori* are insufficient to displace what is of the nature of a *quasi* right.

Appeal. 1914. *In re* LORD INCHIQUIN'S ESTATE (No. 2).

The Attorney-General (*Jonathan Pim K.C.*) and *M'Afee*, for the Treasury, were not called upon.

O'BRIEN L.C. :— Nov. 11.

It does not appear to the Court that it is necessary to reserve judgment in this case.

In stating the grounds which, to my mind, make it perfectly clear that we cannot interfere with the discretion which has been exercised by Mr. Justice Wylie in the present case, I wish to refer shortly to the decision that this Court has already given in the same matter when it came before us in the month of April of the present year. Mr. Justice Wylie has, in the present case, given his reasons for the manner in which he has exercised his discretion, and many of those reasons are such as I might readily agree with, while some of them are such as I might not at first sight give a ready assent to. I mention this because I wish that anything I may say should be considered solely with reference to my own language, both in the previous judgment and in the present one.

In this case the Estates Commissioners, in pursuance of a public statutory duty, exercised the powers which are conferred on them, for the compulsory acquisition of a small portion of the property comprised in the estate of Lord Inchiquin, and I must presume that the Estates Commissioners exercised those powers honestly. They did not acquire the whole of the estate; they were able, by means of a declaration, to make the particular portion in question here the subject of an independent purchase. The contract was brought about by the operation of a proposal to purchase at a certain price, followed by an ascertainment of the price, and, what one might call, the compulsory acceptance by Lord Inchiquin of the price so ascertained. Once this machinery is put in motion Lord Inchiquin has no choice; he must sell. He must, however, get the price which the law says shall be paid to him when his property is thus taken compulsorily.

Appeal. 1914.

In re Lord Inchiquin's Estate (No. 2).

O'Brien L.C.

Now there is not in the Land Act, 1909, or any other of the Acts dealing with the compulsory acquisition of land for this public purpose, any provision such as is contained in the Lands Clauses Act, giving, as compensation to the landlord whose lands are compulsorily acquired, a right to certain costs.

When the case came before this Court in April last, it appeared to the Court that Mr. Justice Wylie was of opinion that he had no jurisdiction to give the costs now in question. After argument, the Court came to the conclusion that he had jurisdiction, under the provisions of the Land Acts and the orders made in pursuance of those Acts, to give such costs. The Court, however, was most careful to disclaim any intention to decide any point except the net one that was before it, namely, that the judge had jurisdiction to grant the particular costs in question, if in his discretion he thought it right to do so. At page 260 of the report I use these words:—"But as to the particular way in which he should exercise it, in this or any other case, I refrain from expressing an opinion. It would be wrong for this Court to lay down any fixed rule as to the manner in which he shall exercise his discretion; that is a question to be decided by him in each concrete case which comes before him, and may not be the same in one case as in another." The case was then sent to the judge for the purpose of exercising his jurisdiction, and I think it is clear from my judgment and the judgments of the other members of the Court, that no rule had been laid down, or ought to be laid down, which should bind him as to the manner in which he should exercise his discretion. The case now comes before us again, and the contention of counsel on behalf of Lord Inchiquin, when divested of all collateral arguments, comes to this, that the discretion is said to be a judicial discretion; in other words, that because the sale is a compulsory one, the discretion must be exercised in one way only, namely in favour of the landlord by granting him the costs unless some ground exists for depriving him of them. Indeed I may say that as the whole matter is one of discretion, I think it would have been impossible for counsel for Lord Inchiquin to argue the case on any other ground. It does not follow, however, that because I consider that to be the only ground on which their

case could be argued, that I also consider the argument should be acceded to. Speaking for myself, I consider—and I think my judgment, as well as the judgments of the other members of the Court when the case was before us on the former occasion, points to this view—that there is no such rule binding on the judge of the Court below in the exercise of his discretion in this matter as is contended for here by counsel on behalf of Lord Inchiquin. I conceive the substance of Mr. Justice Wylie's judgment to be this:—"The Court of Appeal has decided that I am to approach this case from the position of discretion—not a discretion starting with a quasi right in Lord Inchiquin entitling him to these costs unless I see reasons that would justify me in depriving him of them, but a discretion which entitles me to consider whether there is anything arising out of the fact that the land has been compulsorily acquired that would give to Lord Inchiquin a special claim to these costs." I conceive that view to be accurate, and to be the view which this Court intended should control such cases as this, and that there is no rule of law or of equity which compels the judge in this peculiar case of compulsory purchase to decide that the fact of compulsory purchase is to give the landlord a special and absolute privilege to obtain these costs of making title, or if not absolute, that he could only be deprived of such costs by the ascertainment of further facts. The judge is entitled to look at all the facts of the case. In these cases of compulsory purchase it is the law that is the real compulsory agent, acting, not as a private person does who is acting for his own purpose and profit, but acting in a matter of public necessity, without any element of capriciousness or of profit, but for the benefit of the community. The judge has considered whether in this particular case Lord Inchiquin has suffered a real, or any, loss by reason of his property having been taken from him under what are called the compulsory sections of the Act of 1909, and he has come to the conclusion that the fair value which was given to Lord Inchiquin, and which the law requires to be given to him, is, if anything, more, by reason of the exercise of the compulsory powers, than would have been obtained if the lands had been sold voluntarily. That is the conclusion he has come to, and it does not appear to me to be one which anyone who knows the manner in

Appeal. 1914. *In re* Lord Inchiquin's Estate (No. 2). O'Brien L.C.

which these provisions are practically worked out would regard as a startling or inaccurate conclusion. Having come to that conclusion, the judge has decided that there were no special circumstances which entitled Lord Inchiquin to get what the statute did not in terms give him, and that there were no such circumstances as gave him any special equity or claim to an allowance for costs. That being his view, it appears to me that this Court cannot disturb the conclusion he has come to. In so saying I again wish to guard myself from the suggestion that in another case he might not come to a different conclusion.

The basis of my judgment is that it is discretionary in every case whether the judge shall give such costs or not. The discretion should be exercised in accordance with the facts of each particular case, and there is no over-riding principle of law which compels the judge to approach the question of exercising his discretion from the position that he must give the vendor his costs unless he finds some facts which in his opinion justify him in depriving the vendor of such costs. It is not necessary that I should go over the ground which was partially argued on the former application in this case, and fully argued on the present application, the object of which was to show that by some process of analogy, which I conceive does not exist, there should be this peculiar limitation placed on the exercise of the discretion of the judge.

In my judgment, none of the cases cited, either in the Court below or on appeal here, ought to compel this Court to come to such a conclusion. For these reasons I am of opinion that in this particular case we cannot disturb the judgment given by Mr. Justice Wylie in the Court below.

Holmes L.J. :—

I concur. When this appeal was opened before us it struck me that not merely had we heard it all before, but that the very point had been decided. The case first came before this Court in the month of April of the present year. The Estates Commissioners, in the manner in which they have power under statute to do, compulsorily acquired land in the neighbourhood of Lord Inchiquin's residence. It was a piece of land to which he was very much attached, and which I am sure he would a great deal

rather have retained. When that was done and the money paid, an application was made by Lord Inchiquin that his costs of making title to the particular portion of land so acquired should be allowed to him. When the appeal on that matter came before the Court in April last, all the members of the Court at an early stage of the argument came to the conclusion that Mr. Justice Wylie had been of the opinion that he had no jurisdiction to grant the costs asked for by Lord Inchiquin. There was nothing before us to show that in refusing these costs he had acted in the exercise of his discretion. Under these circumstances this Court, having come to the conclusion that the motion before Mr. Justice Wylie was one that he could either have refused or granted, and that he had ample jurisdiction to award costs if he thought right, sent the case back to him for the purpose of enabling him to exercise a jurisdiction which he undoubtedly possessed. So far as my mind was concerned, the only thing I took into account was whether he had jurisdiction to make an order as to costs, such as is made by a judge day after day, refusing or granting costs. We thought that he had jurisdiction, and that he ought to exercise it, but that he had arrived at the erroneous conclusion that he had no jurisdiction. In the course of the few observations I made I stated that :—"It is to be noted that our judgment is strictly confined to the single point. For my own part, I have formed no opinion as to how the judge to whom the discretion is given should exercise it." It struck me at the time that our order was very clear. [His Lordship read the order.] Now Mr. Justice Wylie has heard the motion. Evidence has been given before him, and it may be that some of that evidence was not strictly accurate, and that some documents were laid before him which ought not to have been laid before him; but, taking the whole case from beginning to end, I cannot find anything whatever in his judgment that would show that there was anything erroneous or illegal or improper in the manner in which he exercised his jurisdiction. He exercised the functions he had to exercise under the statute, and he exercised them honestly, though, of course, many men might take a different view from what he has taken. Under these circumstances the case is one that cannot be made the subject of appeal.

Appeal. 1914.

In re Lord Inchiquin's Estate (No. 2).

Moriarty L.J. :—

I concur. I base my judgment on what was decided by this Court when the case was before it in April last, and on what Mr. Justice Wylie has subsequently done in consequence of that decision. This Court might, when the case was before it, have laid down the law in the manner now contended for by Mr. Walsh, but it did not do so. What it did was to decide that the costs asked for by Lord Inchiquin might be given to him by Mr. Justice Wylie in the exercise of his discretion, if, under all the circumstances of the case, he thought it right to do so. Well, this Court having made its April order, the case came again before Mr. Justice Wylie, and he, with the judgment of this Court before him, in the exercise of his discretion refused to allow the costs in question. I have read his judgment, and I can see nothing whatever to quarrel with in it. He found as a matter of fact that the sale was under section 43, and that he could see no reason for giving the vendor his costs of making title. In my opinion he applied his discretion to the matter, and though he exercised it in a manner which produced a result unsatisfactory to Mr. Walsh's client, still we have no power to interfere with it.

Solicitors for the appellant : *MacMahon & Tweedy.*
Solicitor for the Treasury : *J. F. Donnelly.*

J. M.

IN RE D. & T. FITZGERALD

Barton J.
1915.
Feb. 24, 25.
March 18.

Solicitor—Costs—Taxation—Scale Fee—Sale under Lands Clauses Acts—Costs of Purchaser's Solicitor—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order*, 1884, *Sched. I, Part I, Rule* 11.

The scale in Schedule I, Part I, of the Irish General Order of 1884, made under the Solicitors' Remuneration Act, 1881, does not apply to the costs of the solicitor for the purchaser in sales under the Lands Clauses Consolidation Act.

In re Stewart, 41 Ch. D. 494, distinguished.

SUMMONS to review taxation.

Messrs. D. & T. Fitzgerald, solicitors to the Pembroke Urban District Council, furnished the council with a bill of costs connected with the acquisition by the council of lands pursuant to the provisions of the Lands Clauses Act, 1845, and other Acts incorporating the same. The bill of costs came before the taxing master on a requisition to tax. The taxing master considered that Schedule I, Part I, of the General Order, 1884, applied, and calculated the remuneration according to the scale in Schedule I, Part I. The solicitors served a notice objecting to the principle on which the costs were taxed, and required the taxing master to review his taxation. The grounds of objection were as follows—1. That the costs were taxable in detail under the old system as altered by Schedule II of the General Order, 1884, made pursuant to the Solicitors' Remuneration Act, 1881, and not under Schedule I, Part I. 2. That Schedule I, Part I, of the General Order, 1884, was not applicable to the business in respect of which the costs were claimed, and that the costs were not within the scale prescribed by the schedule. 3. That the uniform practice of the taxing masters in Ireland since the date of the General Order, 1884, had been to tax such costs in detail under the old system as amended by Schedule II.

The taxing master made his report and certificate of taxation as follows :—

"The following are the grounds and reasons for my decision on Messrs. Fitzgerald's objections to the disallowances in their

Barton J. 1915.

In re D. & T. FITZGERALD.

miscellaneous bill of costs against the Pembroke Urban District Council.

"These items relate to charges in respect of the investigation of title and completion of conveyance where lands have been acquired compulsorily by the council. The costs are charged in detail under the old system as altered by Schedule II of the General Order, 1884. Clause 2 (*a*) of the General Order provides: 'In respect of sales purchases and mortgages completed, the remuneration of the solicitor having the conduct of the business is to be that prescribed in Part I of Schedule I to this Order, and to be subject to the regulations therein contained.' Rule 11 of Part I, Schedule I, to the General Order provides: 'In the case of sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply.'

"This rule has been the subject of legal decision in England. I refer to *In re Stewart* (1), where Kay J. held that the exception contained in Rule 11 of Part I, Schedule I, of the English General Order only extends to the vendor's costs and not to the purchaser's costs. In view of this decision I am of opinion that the remuneration to be paid to the solicitors for the Pembroke Urban District Council must be calculated according to the scale in Part I, Schedule I, of the General Order.

"The present masters consider that they are bound by the decision in *In re Stewart* (1), and that Schedule I, Part I, of the General Order is applicable to the business in respect of which the said costs are claimed."

The solicitors brought the present summons for an order that the taxing master should review his taxation, and that the bill of costs should be taxed, not according to scale fee, but according to the system existing at the date of the General Order, 1884, as altered by Schedule II thereto.

Leonard, for D. & T. Fitzgerald:—

The Solicitors' Remuneration Act, 1881, sect. 2, provides for a General Order being made regulating the costs connected with sales, purchases, &c. The section does not say that the General Order

(1) 41 Ch. D. 494.

shall apply to *all* sales and purchases. The schedules and scales are not exhaustive; and there may be sales the costs of which will have to be dealt with under the old system: *Parker* v. *Blenkhorn* (1); *In re Greville's Settlement* (2).

The scale does not apply to the present bill of costs because—

1. By rule 11 it is expressly provided that the scale shall not apply in case of sales under the Lands Clauses Consolidation Act. That rule is applicable to the costs of the purchaser's solicitor just as much as it is applicable to the costs of the vendor's solicitor. If this argument is accepted, that is an end of the case; but, apart from the express provision of Rule 11, the sale does not apply to the present bill of costs because,

2. The Irish schedule by which the scale is prescribed is expressly confined to "sales by private contract." In this respect it differs from the corresponding English schedule.

3. By reason of the nature and subject-matter of the transactions comprised in this bill of costs, the scale is not, and could not be made, applicable thereto. In the case of an ordinary purchase, the only title to be investigated is that of the lands acquired, while, where lands are acquired under the Lands Clauses Acts, the title of adjoining lands, not acquired but injuriously affected by the acquisition of the lands taken, may also have to be investigated. In most ordinary purchases the amount of the consideration affords a fair criterion of the measure of the solicitor's responsibility, but it is necessarily otherwise where lands are acquired by a public body under the Lands Clauses Acts.

4. The full scale fee applies only where all the work enumerated in the schedule has been done: *In re Lacey & Son* (3); *In re Hickley and Stewart* (4); *In re Romain* (5). In the English schedules there are two separate scales, one applicable to the investigation of the title alone, and the other applicable to the earlier part of the work involved in a purchase. Under the Irish schedule there is only one scale applicable to all the work in connexion with a purchase. It is not contended that the scale

(1) 14 A. C. 1.
(2) 40 Ch. D. 441.
(3) 25 Ch. D. 301.
(4) 52 L. T. 89.
(5) [1903] 1 Ch. 702.

Barton J. 1915. *In re* D. & T. FITZGERALD.

fee can in any way apply to the proceedings for the acquisition of lands under the Lands Clauses Acts prior to the arbitrator's award fixing the compensation, and there is no power to apportion the scale fee prescribed by the Irish schedule. That would in effect be the creation of a new scale by the taxing master.

5. It would be against public policy so to construe the schedule, and scales prescribed thereunder, as to make the scale applicable to cases under the Lands Clauses Acts. If it were so applicable, it would be to the advantage of the solicitor that the compensation fixed by the arbitrator should be as large as possible, so that the solicitor might be entitled to the higher scale fee, and thus the interest of the solicitor would conflict with the interest of the public body he represents.

If a bill of costs is not within Schedule I, Part I, the costs must be taxed in the old way as altered by Schedule II: *In re Sanders' Settlement* (1); *Barton to Irvine* (2); *In re Briscoe & Smith* (3).

The English case of *In re Stewart* (4) does not apply at all. It is a decision on the meaning of the English Rule 11, the context of which is quite different from that of the Irish Rule 11. The two rules are explanatory of schedules which differ from each other in several material particulars. Further, the subsequent decision of the English Court of Appeal in *In re Burdekin* (5), though it did not affect the actual decision in *In re Stewart* (4), involved a decision as to the meaning of the word "sales" in the English Rule 11, which is quite inconsistent with, and directly contrary to, the construction put upon the same word in the same rule in the earlier decision.

William M'Grath, for the Pembroke Urban District Council:—

Order II of the General Order provides that the scale contained in Part I of Schedule I is to apply to all sales, purchases, and mortgages completed, save those excepted by Order I. The schedule gives only the rate of remuneration, and,

(1) [1896] 1 Ch. 480.
(2) [1899] 1 I. R. 515.
(3) [1903] 1 I. R. 29.
(4) 41 Ch. D. 494.
(5) [1895] 2 Ch. 136.

provided the rate can be applied to the transaction, every sale, purchase, and mortgage, subject to the exception mentioned, is included in it. *Barton to Irvine* (1), and other cases relied on by the other side, were cases where the rate could not be applied, and therefore the transactions were held to be outside the schedule. The words "private contract" and "public auction" in Schedule I, Part I, do not exclude transactions under the Lands Clauses Acts. If they do, then Rule 11 is superfluous. Rule 11 is necessary only because such transactions are included in the schedule. "Private contract" in the schedule is used in contradistinction to "public auction," and includes all contracts not made at public auction, including the statutory contracts under the Lands Clauses Acts. The word "sale," in Rule 11, is used as distinct from "purchase," just as it is used separately, and as having a distinct meaning, in section 2 of the Solicitors' Remuneration Act, in Order II, of the General Order, and in Part I of Schedule I. The rule must therefore be treated as referring to vendor's costs only. It was so decided in *In re Stewart* (2). The judgments in *In re Burdekin* (3) appear to strike at the reasoning in *In re Stewart* (2), but the Court was there dealing with a different subject-matter, and did not disapprove of the former decision. If Schedule I, Part I, is construed as excluding cases under the Lands Clauses Acts where there is no agreement between vendor and purchaser, it must nevertheless be held to include cases where there is such an agreement.

Cur. adv. vult.

March 18.

BARTON J.:—

The question for decision, upon this summons to review taxation, is whether Rule 11 of the Irish General Order, 1884, made in pursuance of the Solicitors' Remuneration Act, 1881, applies to the costs of a purchaser's solicitor. The rule runs as follows: "In case of sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall

(1) [1899] 1 I. R. 515.
(2) 41 Ch. D. 494.
(3) [1895] 2 Ch. 136.

Barton J. 1915. *In re* D. & T. FITZGERALD.

not apply." In *In re Stewart* (1), Kay J. held that the corresponding English rule did not apply to a purchaser's costs. The English rule is a much longer rule, and the learned judge proceeded largely upon the presence in the earlier part of the rule of a reference to negotiations in a case of a "sale or purchase," which led him to the view that the word "sale" did not refer to the whole transaction, but only to the vendor's side of the transaction. The Irish rule contains no such context; and, according to its natural meaning, the word "sale" would appear to include the whole transaction. The sentence in the rule referring to a vendor's charges is merely descriptive of the class of statutes comprehended by the rule. The Court of Appeal was of that opinion in *In re Burdekin* (2), in which case Lindley L.J., at p. 144, showed that the word "sale" was "put in simply as a compendious term to include the transaction of purchase and sale." Lopes L.J., at p. 146, said: "Then it is said that the word 'sale' used in rule 11 does not include 'purchase.' That, I think, would be a great deal too narrow a construction to put upon it. . . . I read the words 'in cases of sales' as if the words had been 'in cases of transactions under the Lands Clauses Consolidation Act, or any other private or public Act.'" Kay L.J., at p. 147, said: "I therefore think that in this case the word 'sale' means, as Lopes L.J. has said, the whole transaction of buying and selling as between the vendor and the purchaser." *In re Burdekin* (2) was a case of vendor's solicitor's costs, and did not overrule *In re Stewart* (1); but it seems to me to displace the only grounds upon which, in the absence of some explanatory context, the Irish rule can be restricted to a vendor's solicitor's costs.

This is the view which has been taken by the taxing masters in Ireland with a full knowledge of *In re Stewart* (1), a case decided in 1889. That case is cited in all the text-books in both countries, but has never been applied in Ireland. The point was not raised by the Urban District Council in the present case, and it is noteworthy that the public bodies and the legal profession have acquiesced for thirty years in the

(1) 41 Ch. D. 494. (2) [1895] 2 Ch. 136.

taxing masters' view that the Irish rule applies to a purchaser's solicitor's costs. *Barton J.* 1915.

There may be items in the bill to which the scale is applicable because they do not relate to sales under the Lands Clauses Consolidation Act. My decision is limited to the question of principle, namely, that, in so far as this bill of costs relates to sales under the Lands Clauses Consolidation Act, the scale does not apply. *In re* D. & T. FITZGERALD.

Solicitors for the applicants: *D. & T. Fitzgerald.*

Solicitor for the Pembroke Urban District Council on Requisition to tax: *John J. McDonald.*

D. M. S.

IN THE MATTER OF THE ESTATE OF ROBERT ORR, DECEASED; M'DERMOTT *v.* ANDERSON AND OTHERS. *M.R.* 1914. Dec. 1.

Will—Charitable Bequest payable out of the Proceeds of the Sale of Land—Charities not administered in Ireland—Death of Testator within three months—Failure of Gift—Charitable Donations and Bequests (Ireland) Act, 1844 (7 & 8 Vict. c. 97), s. 16—Construction—Gift of Income—Absolute Gift.

A testator by his will directed that all his property should be sold by his executors, and directed them, after payment of certain legacies, to invest the residue of the proceeds, and pay the interest on the same to his wife, so long as she should remain single and unmarried, but in case she should marry again, he directed that she should then only receive the interest on half the amount so invested. The will provided that the testator's wife at her death should have power to dispose of half of the money so invested as she should think fit, and that the balance of the other half, after payment of certain legacies, should be divided equally amongst the Presbyterian Orphan Society, the Presbyterian Jewish Mission, the Presbyterian Foreign Mission, and the Presbyterian Colonial Mission. The testator died within three months of the execution of the will; his widow died intestate without ever having married again.

Held—(1) That the words "in Ireland" in section 16 of 7 & 8 Vict. c. 97 (1),

(1) 7 & 8 Vict. c. 97, s. 16: "And be it enacted that after the commencement of this Act no donation, devise, or bequest for pious or charitable uses in Ireland shall be valid to create or convey any estate in lands, tenements, or

M. R. 1914.

M'Dermott v. Anderson.

are to be read in connexion with the words, "no donation, devise, or bequest," and not with the words "pious or charitable uses," and that therefore the gifts to the charities failed so far as they were payable out of the proceeds of the sale of land.

In re Knox, deceased, Snodgrass v. *Gamble*, [1910] 1 I. R. 20, and *Boyle* v. *Boyle*, I. R. 11 Eq. 433, followed; *Brown* v. *Harrison*, 35 I. L. T. R. 25, not followed.

(2) That as regards the lapsed portion of the residue, there was not, on the true construction of the will, an absolute gift to the testator's wife in the first instance, and that therefore on her death it passed to the next-of-kin of the testator as undisposed of.

Summons.

By his will, dated the 21st May, 1891, Robert Orr directed that all his property, both real and personal, should be sold by his executors, and, after bequeathing certain legacies, provided as follows:—"All the rest, residue, and remainder of my money I direct my executors and trustees to invest as they shall think best, and the interest on same I direct them to pay to my wife, Mary Orr, so long as she shall remain single and unmarried, but in case she shall marry again after my death, I direct that she shall then only receive the interest on half the amount so invested as aforesaid, and the interest on the other half I direct shall be paid in equal portions to my friend John M'Corkell, and Robert Laughlin, during the life of my wife. At the death of my wife I desire that she shall have power to dispose of half of my money so invested as aforesaid as she shall think fit." The balance of the other half of his money, after payment of certain legacies, the testator directed to be equally divided amongst the following Presbyterian societies, namely:—The Presbyterian Orphan Society, the Presbyterian Jewish Mission, the Presbyterian Foreign Mission, and the Presbyterian Colonial Mission. The testator died on the 22nd May, 1891, and probate of his will was granted to the

hereditaments for such uses, unless the deed, will, or other instrument containing the same shall be duly executed three calendar months at the least before the death of the person executing the same, and unless every such deed or instrument, not being a will, shall be duly registered in the office for registering deeds in the city of Dublin within three calendar months after the execution thereof."

plaintiff, one of the executors named therein, the other executor having renounced. Mary Orr, the testator's widow, died on the 31st December, 1913, without having re-married. By an order of the Master of the Rolls, dated the 21st April, 1914, made on a summons taken out by the defendant, Joseph Anderson, as personal representative of Mary Orr, it was declared that, on the true construction of the will of the testator, Mary Orr took an absolute interest in one moiety of the residue of his estate. The remaining moiety consisted in part of the proceeds of the sale of lands. This summons was taken out by the executor of the testator for the determination of two questions: whether the gift of the residue to the charities lapsed so far as the residue represented the proceeds of the sale of lands; if so, did such lapsed portion go to the next-of-kin of the testator or to the personal representative of the widow?

Pringle for the plaintiff.

Herbert Wilson K.C., for the Presbyterian Foreign, Jewish, and Colonial Missions.

It is submitted that the bequest to these charities is good; no portion of the moneys received by them is applied for pious or charitable uses in Ireland. The words of sect. 16 of 7 & 8 Vict. c. 97, are: "no donation, devise, or bequest for pious or charitable uses in Ireland," and the question is, what part of the section do the words "in Ireland" govern. Grammatically they should be read with the words "pious or charitable uses," and in *Brown* v. *Harrison* (1) Chatterton V.-C. held that a bequest to the Foreign Missions of the Presbyterian Church in Ireland was not a "bequest for pious or charitable uses in Ireland" within the meaning of sect. 16.

Babington for the next-of-kin of the testator.

The bequest to the charities, so far as it represents the proceeds of the sale of land, lapses and goes to the next-of-kin of the testator. In *Boyle* v. *Boyle* (2), Chatterton V.-C. held that the words "in Ireland" applied to "donation, devise, or bequest."

(1) 35 I. L. T. R. 25. (2) I. R. 11 Eq. 433.

M. R. 1914. M'DERMOTT v. ANDERSON.

No doubt this is inconsistent with his later decision in *Brown* v. *Harrison* (1); but in *In re Knox, Snodgrass* v. *Gamble* (2) Barton J., following *Boyle* v. *Boyle* (3), held that a bequest to Dr. Barnardo's Homes in England was void so far as the testatrix's lands were concerned, she having died within three months of making her will.

As regards the claim of the personal representatives of the testator's widow, a gift of income is only presumed to carry the corpus when you can find in the will no indication of a contrary intention; there is evidence of such an intention here.

L. R. Lipsett, for Joseph Anderson, the personal representative of Mary Orr :—

The gift in the testator's will to his wife is an indefinite gift of the income of the whole fund, and this amounts to a gift of the corpus, even where, as here, legacies are given payable on the death of the legatee of the income: Jarman, 6th ed., p. 1185, *Jenings* v. *Baily* (4); *Rishton* v. *Cobb* (5); *In re Howard, Taylor* v. *Howard* (6). If I am right in this, then the gifts over having failed, the prior gift takes effect: see *Handcock* v. *Watson* (7), where Lord Davey says, at p. 22: "In my opinion, it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity, or any other reason, then the absolute gift takes effect, so far as the trusts have failed, to the exclusion of the residuary legatee or next-of-kin as the case may be." [He also referred to *Weale* v. *Ollive* (8); *Lassence* v. *Tierney* (9).]

Herbert Wilson K.C. in reply :—

Brown v. *Harrison* (10) was decided in 1900. In *Boyle* v. *Boyle* (11), which was decided in 1877, there was nothing on the face of the will pointing to works of charity outside of Ireland.

(1) 35 I. L. T. R. 25.
(2) [1910] 1 I. R. 20.
(3) 1 R. 11 Eq. 433.
(4) 17 B. 118.
(5) 5 My. & C. 145, 152.
(6) [1901] 1 Ch. 412.
(7) [1902] A. C. 14.
(8) 32 B. 421.
(9) 1 Mac. & G. 551.
(10) 35 I. L. T. R. 25.
(11) I. R. 11 Eq. 433.

The bequest there was "upon trust that they" (the testator's executors) "shall apply the residue of my estate to works of charity, such as Masses for the eternal repose of my soul, and whatever else they may judge most charitable." Further, in that case the charities were not represented.

O'CONNOR M.R.:—

Two questions arise for decision in this case. The first is whether the gift of residue to these charities is valid. Section 16 of the Charitable Donations and Bequests Act, 1844 (7 & 8 Vict. c. 97), provides that "no donation, devise, or bequest for pious or charitable uses in Ireland shall be valid to create or convey any estate in lands, tenements, or hereditaments for such uses, unless the deed, will, or other instrument containing the same shall be duly executed three calendar months at the least before the death of the person executing the same." The testator died within three months, and portion of the residue consists of the proceeds of the sale of land. Now the question is whether the words "in Ireland" are to be read in connexion with the words "pious or charitable uses," or with the words "donation, devise, or bequest." That question came before the Vice-Chancellor in 1877 in *Boyle* v. *Boyle* (1), and he decided that the words "in Ireland" applied to the words "donation, devise, or bequest," so that in the event of a legacy being given by a testator domiciled in Ireland for pious or charitable purposes, no matter where they were to be carried out, the gift failed if the testator died within three months. But then, in 1900, in *Brown* v. *Harrison* (2) he gave a decision in direct conflict with his decision in *Boyle* v. *Boyle* (1), holding that the words "in Ireland" must be read in connexion with the words "pious and charitable uses." In that case his attention does not seem to have been called to his previous decision in *Boyle* v. *Boyle* (1). If the matter rested there, I should be in a very embarrassed position; but I have the decision of Barton J. in *In re Knox, deceased, Snodgrass* v. *Gamble* (3), and he, having considered both cases, came to the conclusion that the

(1) I. R. 11 Eq. 433.
(2) 35 I. L. T. R. 25.
(3) [1910] 1 I. R. 20.

M. R. 1914. M'DERMOTT v. ANDERSON.

earlier doctrine was the correct one, and stated that the reasoning of the Vice-Chancellor in that case commended itself to him. He says, at p. 22: "The object of the section was not to prevent dispositions in favour of Irish charities as distinguished from English or foreign charities, but 'to prevent the mischief of improvident alienations or dispositions by languishing or dying persons in Ireland.'" That seems to me to have been the policy of the Act, namely, to protect testators during their last moments, and to have been the reason for holding that the words "in Ireland" govern the words "donation, devise, or bequest." I must hold that the gift of residue to these charities fails so far as the residue consists of the proceeds of the sale of land.

Then a contest arises as between the next-of-kin of the testator and the personal representative of his widow. Mr. Lipsett contends that the widow took an absolute interest in the residue, subject to the charitable legacies, and that, in so far as these fail, her personal representative takes the subject-matter discharged from them. That depends on his showing that by the terms of the will the testator intended her to take an absolute interest. Certainly the words of the will do not amount to an absolute bequest in terms; if there is one, it must be evolved from these very ambiguous words: "All the rest, residue, and remainder of my money I direct my executors and trustees to invest . . . and the interest on same I direct them to pay to my wife, Mary Orr, so long as she shall remain single and unmarried, but in case she shall marry again after my death I direct she shall then only receive the interest on half the amount so invested as aforesaid . . . At the death of my wife I desire that she shall have power to dispose of half my money so invested as aforesaid as she shall think fit." Reading the whole will, I do not think that the testator intended to give the entire residue to his widow subject to the charitable legacies. Mr. Lipsett has referred me to the case of *Jenings* v. *Baily* (1). In that case the testatrix devised all the residue of her real estate to M. S., her heirs and assigns, for ever; and her personal estate she directed her executors to pay to or otherwise permit and suffer M. S. or her assigns to take, receive, and enjoy

(1) 17 B. 118.

the dividends and annual profit and produce thereof. That was clearly an absolute gift of the realty, and there was no qualification of what was in terms an absolute gift of the personalty also. The testatrix went on to say: "and from and after the death of M. S. I give to my dear young friends" [naming four] "£1000 to be equally divided. After the death of M. S. I give Charles Jenings, Esq., £100." That really means that the legatees were to be postponed until the death of M. S., but no attempt was there made to cut down the gift to her. By a codicil of the 24th October, 1833, the testatrix requested M. S. to give several sums to the persons therein named; from that it is clear that the testatrix regarded her as residuary legatee. The Master of the Rolls said: "It is quite clear that the gift of the residue of the personal estate, standing alone, would have been an absolute gift; and the question therefore is, whether it is cut down by the subsequent bequests. . . . There is unquestionably some ambiguity in the words which she has used, but there is no expression of intention sufficiently strong to cut down the absolute interest previously given. I attach some weight to the circumstance, that by the letter constituting the first codicil, the testatrix requests Mary Sparrow to pay certain legacies, which she would not have done, if she had not intended her to take the absolute interest under the residuary bequest." That being so, I do not think that that case is any authority in another case unless the language used is similar.

The other case upon which Mr. Lipsett relies is *Handcock* v. *Watson* (1), but that case differs from the present in that there there was an absolute gift to Susan Drake in the first instance, on which were engrafted trusts, some of which failed, and the question arose whether, on the failure of the gift over, the next-of-kin of the testator or the representatives of Susan Drake were entitled. Lord Davey says, at p. 22: "In my opinion it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other

(1) [1902] A. C. 14.

M. R. 1914.

M'DERMOTT v. ANDERSON.

reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next-of-kin as the case may be." But that principle only applies to cases where there is an absolute gift in the first instance. Lord Davey continues: "Of course, as Lord Cottenham pointed out in *Lassence* v. *Tierney* (1), if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts." That is the real principle, and the principle which I seek to apply here. Looking at the whole will, I am of opinion that on its true construction there was not an absolute gift to the testator's wife in the first instance, and I therefore hold that she was only entitled to a life estate in this moiety of the residue. I will declare that so much of the testator's residuary estate as consists of the proceeds of the sale of land is, in the events that have happened, undisposed of, and goes to the next-of-kin of the testator.

Solicitors for the plaintiff: *Tillie M'Dermott & Munn.*

Solicitor for the next-of-kin: *A. T. Ellis.*

Solicitor for the defendant, Joseph Anderson: *W. P. Mooney.*

Solicitors for the Presbyterian Jewish, Foreign, and Colonial Missions: *Carson & M'Dowell.*

Solicitors for the Presbyterian Orphan Society: *James Henry & Son.*

A. H. W.

Ross J. 1915.

Mar. 15, 19.

IN THE MATTER OF THE ESTATE OF BLANCHE HENRIETTA TOPPIN.

Merger — Estate for Life and Ultimate Remainder in Fee — Contingent Remainder interposed — Merger of Life Estate and Remainder — Extinguishment of Charge on Inheritance.

A, by her mother's will, was given a life estate in realty which, subject thereto, was to be settled on her issue in such way as she might desire. In default of issue she was given a general power of appointment with remainder to herself in fee. A. at the time of her mother's death was entitled to a charge on the estate. She died at the age of seventy without ever having been married, and without having done any act indicating a desire to keep the charge alive.

(1) 1 Mac. & G. 551.

Held, that A. took under the will an estate in fee, subject to be re-opened if the contingent estate to the issue became vested in interest, and that the charge had become extinguished.

OBJECTION to the final schedule of incumbrances.

Elizabeth Georgina Magan, who died in 1880, by her will, dated the 30th April, 1850, gave and bequeathed to her daughter, Augusta Elizabeth Magan, all her property of what nature or kind soever, for the sole use and benefit of the said Augusta Elizabeth Magan during her life, and, subject to her life interest therein, to be settled upon her issue in such way as she might desire, and in default of issue of her said daughter to go to such person or persons as she should by will give and bequeath the same; and the testatrix appointed her said daughter sole executrix and residuary legatee.

Augusta Elizabeth Magan died, without ever having been married, on the 26th October, 1905, aged seventy years and upwards, having previously made her will, dated the 15th January, 1881, whereby she left to the person or persons who should be her heir or heiress-at-law at her death all her real, freehold, and chattel real estate, except certain premises in Delgany, and, after bequeathing certain pecuniary legacies, bequeathed the residue of her personal estate to her executors to build, or assist in building, hospitals, and she declared that she made her said will in pursuance of the powers contained in her mother's will and of all other powers and authorities whatsoever.

Under the provisions of a post-nuptial settlement, made in 1837, Augusta Elizabeth Magan was, at the date of her mother's death, absolutely entitled to a charge of £3333 late Irish currency upon the freehold estates devised by her mother's will.

The objection to the final schedule submitted that upon the true construction of the will of Elizabeth Georgina Magan, and in the events which had happened, Augusta Elizabeth Magan was at the time of her death seised of the fee-simple and inheritance of the lands sold in this matter, and that the charge of £3333 became extinguished and merged in the fee-simple and inheritance, and that the claim at item 8 in respect thereof should be disallowed and struck out of the schedule.

Ross J.
1915.

In re TOPPIN'S ESTATE.

Gerald FitzGibbon K.C. (with him *C. Murphy*) in support of the objection :—

The charge is extinguished. Where the owner of an estate acquires an incumbrance upon the estate, or where an estate is acquired by the owner of an incumbrance upon it, the incumbrance is extinguished, in the absence of an intention, express or implied, to keep it alive. Such an intention may be implied where it is for the benefit of the owner to preserve the charge, as in the case of the owner of a limited estate, or where there are heavy puisne incumbrances. If it is indifferent to the owner whether the charge be extinguished or not, it will be presumed to have been extinguished : *Forbes* v. *Moffatt* (1) ; *Horton* v. *Smith* (2) ; *Donisthorpe* v. *Porter* (3).

Miss Magan was for all practical purposes owner in fee of the estate, subject to her own incumbrance, and there was no puisne incumbrance of any importance.

The Lord Chief Baron decided, in a revenue case (unreported) arising out of this estate, that Miss Magan was, at the moment of her death, the owner of an absolute interest, and that the estate passed on her death, as unsettled property, under her own will and not that of her mother. Further, she was under her mother's will entitled to an estate for her own life, with an absolute power of disposition by will, and in default a remainder in fee to herself, subject only to a contingent estate limited in favour of her issue, if any. Such limitations vested in her an estate in fee-simple, liable to be divested on the birth of issue, the life estate and the ultimate remainder in fee coalescing to create " a qualified fee," or " a fee *sub modo* " until the birth of issue : *Lemon* v. *Mark* (4). The owner of such a qualified fee is seised of an estate of inheritance in possession for the purpose of dower or curtesy : *Hooker* v. *Hooker* (5).

In the present case the estate was indefeasible, as the contingency had ceased to be possible, a circumstance of which Miss Magan must have been aware, and a Court of Equity would

(1) 18 Ves. 384.
(2) 4 K. & J. 624.
(3) 2 Ed. 162.
(4) [1899] 1 I. R. 416, at pp. 443, 436.
(5) Lee, temp. Hard. 13.

have treated her as absolute owner from the period at which possibility of issue had ceased: *In re Fermoy's Estate* (1). She never dealt with or referred to the charge during her life or by her will, and the language of her will does not support the view that she intended the legatees of her personal estate to take the charge and realize it out of her real estate.

Brunskill K.C. (with him *Herbert Jones*), for the executors of Miss Magan:—

At no time in Miss Magan's lifetime had she the fee, though at her death the fee-simple passed. Therefore the charge was never extinguished. No legal proposition can be founded on the impossibility of issue: *per* Chitty L.J., in *In re Hocking, Michell* v. *Loe* (2). If Miss Magan had sold during her lifetime, she would have sold as tenant for life under the Settled Land Acts. The fee did not become absolute in her during her life. During her life she was tenant for life of the lands and absolute owner of the charge, and there was no merger. At the moment of her death the charge passed to her legatees, and the fee of the lands passed to her heir-at-law. The debtor and the creditor of the charge were then two distinct persons, and no merger could take place: *Wyndham* v. *Egremont* (3); *Compton* v. *Oxenden* (4). It was in the interest of Miss Magan that the charge should be kept alive: *In re Bury's Estate* (5); *In re Bayly's Estate* (6); *Ingle* v. *Vaughan Jenkins* (7); *Richards* v. *Richards* (8).

C. Murphy in reply:—

The Court will sanction the payment out of Court of a fund to parties entitled in default of a lady of fifty-three years of age having children: *Haynes* v. *Haynes* (9). A title depending on the fact that a woman of sixty-three is past child-bearing will be forced on a purchaser: *Browne* v. *Warnock* (10).

Cur. adv. vult.

(1) Barton J., 1913. Unreported.
(2) [1898] 2 Ch. 567, at p. 572.
(3) 2 Ambler, 753.
(4) 2 Ves. Jun. 260 a.
(5) [1898] 1 I. R. 379.
(6) [1898] 1 I. R. 383.
(7) [1900] 2 Ch. 368.
(8) John. 766.
(9) 14 W. R. 361.
(10) 7 L. R. Ir. 3.

Ross J.
1915.

In re TOPPIN'S ESTATE.

March 19.

Ross J. :—

This comes before me on an objection on the part of the trustees of the devisee of the will of Augusta Elizabeth Magan, requiring the removal from the schedule of a charge of £3333, late Irish currency, which was vested in the said Augusta Elizabeth Magan. The ground of the objection is, that the lands sold in this matter, which were subject to this charge, passed to the said Augusta Elizabeth Magan under the will of her mother, Elizabeth Georgina Magan, and that, in consequence of a merger, the charge no longer subsists.

Elizabeth Georgina Magan, by her will dated the 30th April, 1850, gave and bequeathed to her daughter, Augusta Magan, all her property of every kind for the sole use and benefit of Augusta Magan during life, and subject to her life interest therein to be settled upon her issue in such way as she might desire, and in default of issue to go to such persons as she should by will give the same; and the said testator appointed her said daughter sole executrix and residuary legatee.

The said Elizabeth Georgina Magan died on the 12th day of September, 1880, and probate of her will was granted in the following year to her daughter Augusta Magan.

As appears from a learned judgment of the Lord Chief Baron in a question raised by the Crown in respect of duties payable by the estate of Augusta Magan, the said Augusta Magan at the time of the making of her will hereinafter mentioned had a power of appointment over the property devised, contingent upon there being a failure of her issue, and had in herself in the same event, subject to her life estate, the remainder in fee in the realty and the absolute interest in the personalty. The said Augusta Magan died at an advanced age, exceeding seventy years, a spinster, on the 26th October, 1905, having previously made her will dated the 15th January, 1881, whereby she devised all her real estate to her heir-at-law, and bequeathed the residue of her personal estate to her executors upon certain charitable trusts.

As to the law of the matter, the test is whether a period existed when it was absolutely indifferent to the owner of the

lands charged and the charge whether it was kept subsisting or not.

Now if an actual estate had been interposed, and not merely a contingent estate, it would be hard to contend that a merger had taken place. Again, if there had been trustees to preserve contingent remainders, as in the case of *Wyndham* v. *Egremont* (1), I should have considerable doubt as to the possibility of merger. In this case we have neither the interposition of an actual estate nor a limitation to trustees to preserve contingent remainders. Therefore I think that, on her mother's death, Augusta took the estate in fee, subject to re-opening if the contingent estate became vested in interest, which it never did. If the devise had been to a man, and he had died intestate without having barred dower, his widow would be entitled to dower out of these lands, as appears from the decision of the Irish Court of Appeal in *Lemon* v. *Mark* (2). There is another way in which the case presents itself. Chatterton V.-C. decided in *Browne* v. *Warnock* (3) that a title, the validity of which depends upon the presumption that a woman of sixty-three is past child-bearing, will be forced upon a purchaser of real estate. This decision, notwithstanding the opinion of Lord St. Leonards to the contrary (Dart, Vendors and Purchasers, 7th ed., p. 385, Sugden, 14th ed., p. 418), seems to me sound, and has never been overruled.

The objection that there is no mathematical certainty against the contingency seems to me a futile objection. If the Court holds it safe to pay out a fund, no matter how large, acting upon this presumption, it is surely safe to act upon it in such a case as we are now dealing with.

In re Hocking, Michell v. *Loe* (4) is not really at variance, because there the Court held that where property is given to one person in the event of another leaving a child, the Court would not enter into the question for the purpose of depriving the first person of his chance of the estate.

Every question of merger involves a question of intention. Augusta Magan, when she reached the age of sixty or thereabouts,

(1) 2 Ambler, 753.
(2) [1899] 1 I. R. 416.
(3) 7 L. R. Ir. 3.
(4) [1898] 2 Ch. 567.

Ross J. 1915.

In re TOPPIN'S ESTATE.

must be taken to have known that the contingency could never take effect. She certainly did no act to indicate any desire that the charge was to be kept alive, and she had no interest whatever in keeping it alive. I am therefore of opinion that a merger took place, and allow the objection.

Solicitors for the vendor and objector: *T. T. Mecredy & Son.*
Solicitors for the executors of Miss Magan: *Brown & Maunsell.*

D. M. S.

IN RE BURKITT, DECEASED.

HANCOCK *v.* STUDDERT.

M. R.
1914.
Mar. 23, 30.

(1915. No. 171.)

Will—Construction—Life Estate or Absolute Interest—Gift for Life with Power of Disposition superadded.

A testator bequeathed to his sister M. the sum of £2000 for her life, and at her death to be disposed of as she so wished. M. died without making any disposition of the £2000.

Held, that M. took a life interest only, with a power of appointment.

ADJOURNED SUMMONS.

George Ormsby Edward Burkitt of Merton House, Kilkee, county Clare, Ireland, formerly of Perth, Western Australia, by his will made the 13th September, 1909, made the following bequest:—"To my sister Mary Studdert I bequeath the sum of £2000 for her life and at her death to be disposed of as she so wishes." The question for the Court was whether this was an absolute bequest to Mary Studdert, or for her life only with a power of appointment. The legatee died without making any disposition of the legacy.

The testator died on the 28th September, 1909, and the will was proved on the 14th December, 1909. The amount of the legacy was claimed by the personal representative of the legatee.

The present summons was issued for the purpose of determining, *inter alia*, whether or not she was absolutely entitled to the legacy.

Serjeant Matheson K.C. (with him *Smylie*, for *T. J. D. Atkinson* now serving in His Majesty's forces), for the plaintiff, the executor and trustee of the will of George Ormsby Edward Burkitt.

M. R. 1914.

HANCOCK v. STUDDERT.

R. F. Harrison K.C. (with him *James Andrews*), for Frances Wilkinson, a legatee under the will, and one of the next-of-kin of the testator:—

The £2000 is expressly given to Mary Studdert for her life, and the power to dispose of it which is added does not make the bequest an absolute gift. There are a large number of cases on the meaning of the word "dispose." If there is a gift of money in words sufficient to give the legatee an absolute interest, this will not be cut down by the addition of words giving to the legatee a power of disposition. The additional words merely illustrate the nature of the gift. But if a sum of money is given expressly for life, with a power of disposition afterwards, that does not amount to an absolute interest; the legatee takes only a life interest, if he does not exercise the power. These principles are succinctly stated in Lord Halsbury's Laws of England, vol. xxviii, p. 771, s. 1408, and in Theobald on Wills, 7th ed., p. 482. Mrs. Studdert could have disposed of the £2000 by a deed in her lifetime, or by a will referring to the power of disposition, but she did not do so. *Reid* v. *Carleton* (1) was an exception to these rules. The testator there left all his property to his wife for life, and directed his executors to pay certain legacies, and that any balance remaining after the legacies were paid was to be disposed of according to the wishes of his wife. She made no disposition of the property. Barton J. held that she took the property absolutely, subject to the legacies payable after her death. He came to the conclusion that the life estate was given for the purpose of preserving a fund for payment of legacies at his wife's death, and that it was one of those wills in which, as Knight Bruce V.-C. said in *Nowlan* v. *Walsh* (2), an intention to give a life interest may rationally be supposed to co-exist with an intention afterwards to give an absolute interest in the residue. The authorities on the subject are referred to in the arguments in *Reid* v. *Carleton* (1). *Archibald* v. *Wright* (3) there cited is like the present case. There the testator directed that after his wife's death the sum of £1000 4 per cent. stock should

(1) [1905] 1 I. R. 147.
(2) 4 De G. & Sm. 586.
(3) 9 Sim. 161.

be transferred to Johanna Grant for her sole and entire use during her life, that she should not alienate it, but enjoy the interest during her life, and at her decease to dispose of it as she thought fit. Shadwell V.-C. held that she took a life interest, with a power to dispose of the stock by will. Here, Mrs. Studdert had power to dispose of the legacy by deed or by will. In *Nannock* v. *Horton* (1), Lord Eldon, at p. 398, lays down the principle that where there is a limited interest and this sort of power, though the latter without a limited interest pointed out might have amounted to an absolute gift, yet, when both occur, the gift is held to be of the limited interest, and the other to be but a power, not an interest. So in *Bradly* v. *Westcott* (2) it is laid down that the distinction, though slight, is well established between gifts for life and gifts indefinitely, with power of disposition. The latter vest the property without appointment; the former require appointment. *In re Stringer's Estate* (3) and *In re Thomson's Estate* (4) illustrate this principle.

M'Cann K.C. and *Hugh Kennedy* for George Ormsby Studdert, the personal representative of Mary Studdert:—

There may be, 1, a gift to a person for life, with remainder as he shall by deed or will appoint, and in such a case it may be that it is only a gift for life; or 2, there may be a gift over following words like those here, in which case the gift would be for life only, or 3, there may be general words of disposition and no gift over, in which case the whole will should be looked at to see whether the gift is absolute or for life. It is submitted that the gift here comes within the third class, and that it is an absolute gift. In *Hoy* v. *Master* (5), a testator left the whole of his property to his wife for her life, and directed that on her death one-third should devolve on his daughter M., and that the other two-thirds should be at the sole and entire disposal of his wife, trusting that if she did not marry again, or have other children, she would make their daughter M. her heir.

(1) 7 Ves. 391.
(2) 13 Ves. 445.
(3) 6 Ch. D. 1.
(4) 14 Ch. D. 263.
(5) 6 Sim. 568.

M R. 1914.

HANCOCK v. STUDDERT.

Shadwell V.C. held that the wife took an absolute interest in the two-thirds. In *In re Maxwell's Will* (1) the testator gave to his eldest son the interest on £10,000 3 per cent. annuities during his life, and in case of his death, leaving issue, his executors were to divide the £10,000 amongst his surviving children; but if he should die without issue, the testator gave a moiety of the said securities to be disposed of as his said son should think proper; the other half he gave to such of his grandchildren as might be then living. The eldest son died unmarried and intestate, without having made any disposition of the moiety of the fund. The Master of the Rolls held that there was an absolute gift of the moiety to the son. He was of opinion that the words of the will did not import the execution of a power, but gave the property. *Archibald* v. *Wright* (2) is really in our favour. The dicta in *Nannock* v. *Horton* (3) and *Bradly* v. *Westcott* (4) must be taken with the context. [The cases cited in argument on this point in *Nannock* v. *Horton* (3), viz., *Liefe* v. *Saltingstone* (5), *Tomlinson* v. *Dighton* (6), *Maskelyne* v. *Maskelyne* (7), were also referred to.]

James Andrews in reply:—

If a testator wishes to dispose of all his property, he puts a residuary clause in his will, but here there is none. An express gift for life followed by a power to appoint by deed or will gives admittedly only a life interest; and it makes no difference that the express gift for life is followed by general words of disposition as here. In *Hoy* v. *Master* (8) the testator gave his wife the whole of his property for her life, but placed only two-thirds at her disposal, the other third being given to a daughter. In *In re Maxwell's Will* (1) the dividends on a sum of stock were given to a son for life, with a power in certain events to dispose of a moiety only. *Reid* v. *Carleton* (9) was a decision on the language of a particular will of an untechnical character.

(1) 24 B. 246.
(2) 9 Sim. 161.
(3) 7 Ves. 391.
(4) 13 Ves. 445.
(5) 1 Mod. 189.
(6) 1 P. Wms. 149.
(7) Amb. 750.
(8) 6 Sim. 568.
(9) [1905] 1 I. R. 147.

O'CONNOR M.R.:—

The portion of the will on which the question raised by the summons turns is as follows:—"To my sister Mary Studdert I bequeath the sum of £2000 for her life, and at her death to be disposed of as she so wishes." Two views have been presented—one, that this bequest gave only a life estate with a power of appointment; the other, that it gave an absolute interest. In support of the latter view it is urged that the bequest carried with it all the attributes of absolute ownership, because it gave the legatee full enjoyment during her life, with a full power of disposition after her death. Absolute ownership, however, is inconsistent with a life estate, and, prima facie, when a testator bequeaths a property for life in express terms, he means that the legatee shall have a life estate only. The enlargement of the limited estate into absolute ownership requires coercive language in some other part of the will. I can find nothing in this will which compels me to think that the testator intended to give Mary Studdert any greater property in the legacy than a life estate, using the word "property" as distinguished from power. I take the terms of the bequest—"To my sister Mary Studdert I bequeath the sum of £2000 for her life." Here there is a life estate in express words—"and at her death to be disposed of as she so wishes." These words are apt for the creation of a power of appointment, and there is consequently no need for the construction which would enlarge a life estate expressly so given into an unlimited estate. Therefore I hold that Mary Studdert took a life interest only with a power of appointment.

This, I think, comes within the principle laid down by Lord Eldon in *Nannock* v. *Horton* (1) at p. 398, where he says: "Where there is a particular limited interest, and this sort of power, liberty, or authority, though the latter without a particular, partial, limited interest, pointed out, might have amounted to an absolute gift, yet, when both occur, the gift is held to be of the limited interest, and the other to be but a power, and not an interest." It seems to me that that principle is in accordance with good sense. It may be otherwise expressed, viz., that where

(1) 7 Ves. 391.

M. R. 1914. HANCOCK v. STUDDERT.

you have a bequest limited in express terms as here, it is not to be enlarged by any ambiguous provisions such as a power of disposition which may be construed as an incident of absolute ownership, or as a power superadded to limited ownership. Similarly, if you have an indefinite gift, which by itself would give an absolute interest, it is not to be cut down because there is a power of disposition added.

In support of the construction which I place on the bequest, it is not unimportant to observe that when the testator wished to give a legacy absolutely, he knew how to do it, for in another part of the will he gives a legacy to his sister Frances Wilkinson in these terms:—"To my sister Frances Wilkinson I bequeath the sum of £200," that is an absolute interest.

Solicitors for the plaintiff: *T. W. Hardman & Son.*
Solicitor for Frances Wilkinson: *R. A. E. Evans.*
Solicitors for George Ormsby Studdert: *Thomas Kelly & Co.*

W. L.

HOLIEN *v.* TIPPING.

Barton J. 1914. Dec. 2, 16.

(1914. No. 213.)

Foreshore—Removal of Gravel—Injury to neighbouring Landowner—Injunction.

To destroy wilfully a natural barrier against the incursions of the sea so as to occasion damage to neighbouring lands is a nuisance, in respect of which there is jurisdiction to grant an injunction and damages.

Attorney-General v. *Tomline*, 14 Ch. D. 58, followed and applied.

ACTION claiming an injunction and damages.

The following statement of facts is taken from the judgment of Barton J.

The plaintiff was the registered owner in fee-simple of a small farm which was bounded by a tidal river called the Ballymascanlon river. The margin of her land towards the river was faced with stones so as to make a sort of rampart. A strand of gravel and shingle extended from this rampart for several feet to the ordinary high-water mark. The defendant claimed to be the

owner of the foreshore, and to have a right to take gravel from the strand. In exercise of these rights she had, for a number of years, removed gravel from the shore opposite plaintiff's lands for the purpose of finishing the avenue of her demesne and the walks round her house. The gravel at this point was suitable for that particular purpose.

At the trial the plaintiff's case was rested exclusively on an alleged nuisance, consisting in the removal of a ridge or bank of gravel, to the protection of which, against the encroachments and inroads of the sea, the plaintiff claimed to be entitled. Plaintiff claimed that the removal of the protecting barrier had caused the washing away and destruction of her rampart and the flooding of her lands, and had rendered her lands liable to periodical flooding. Evidence was given to the effect that, if this natural barrier had not been in existence, it would have required a concrete wall to withstand the inroads of the sea.

It was proved by the plaintiff's witnesses, and admitted by one of the defendant's witnesses, that this natural barrier existed down to a comparatively recent date, and that it consisted of a bank or ridge of gravel opposite plaintiff's rampart, which was a protection to that rampart; that this bank or ridge of gravel had been removed for the purpose of maintaining or finishing defendant's avenue, or the walks round her house; that the removal of this ridge or bank extended over a number of years, and was substantially done by the defendant and her servants for the defendant's benefit. It appeared that in recent years the defendant's servants had gone round a bend in the shore to another point, either because of a warning, or because the ridge of gravel at the point in question had been removed. It was admitted that the plaintiff was the person upon whom lay the obligation to repair the rampart, but the evidence of plaintiff's witnesses was to the effect that the fall of the rampart was not the result of non-repair, but was caused by the water coming over the top and sinking in behind the rampart and displacing it.

Jellett K.C. and *Lardner*, for the plaintiff.
Dickie K.C. and *James Henry*, for the defendant.

Cur. adv. vult.

Barton J.
1914.

HOLIEN
v.
TIPPING.

Dec. 16.

BARTON J. [after referring to the facts, continued]:—

The effective cause of the destruction of this rampart was the removal of the protecting bank or ridge of gravel by the defendant and her servants for the defendant's benefit; and the defendant, having wilfully removed, or caused to be removed, this natural barrier so as to occasion damage to the plaintiff, has been guilty of a nuisance which gives the plaintiff a right of action. If this land and shore had remained the land of the Crown, as this and all other land once was, or is presumed to have been, it would have been a wrongful act on the part of the Crown to have wilfully removed this barrier, and it is not less so when done by a subject in the exercise of alleged right over the land and shore. That is the reasoning of James L.J. in *Attorney-General* v. *Tomline* (1), as I understand it, and I think it covers the present case.

It makes no difference that the margin of plaintiff's land is faced with stones. The stones were presumably placed there to strengthen the plaintiff's boundary. The evidence is to the effect that, if the bank of gravel had not been there, it would have required a concrete wall to withstand the inroads of the sea. Under these circumstances, I am of opinion that the plaintiff is entitled to an injunction and to an inquiry as to damages.

Solicitor for the plaintiff: *J. P. Johnston.*
Solicitor for the defendant: *Robert Dickie.*

D. M. S.

(1) 14 Ch. D. 58, at p. 62.

HEARD *v.* GABBETT.

Rose J.
1915.
April 21.

Land Purchase Acts—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48—*Bonus—Will—Construction—Gift of Proceeds of Sale of Lands being sold to Tenants.*

The percentage or bonus payable under sect. 48 of the Irish Land Act, 1903, is a personal thing given as an inducement to an owner to sell lands. It is not an interest in the lands sold, nor is it part of the proceeds of sale of the lands, and therefore does not pass under a gift in a will of "my lands . . . being sold to the tenants under the Land Law (Ireland) Act, 1903, and the proceeds thereof when sold."

View of Eve J. in *Tremayne* v. *Rashleigh*, [1908] 1 Ch. 681, that the bonus is an interest in the lands, dissented from.

SUMMONS for the determination of questions arising on the construction of the will of Thomas Richard Gabbett.

The testator died on the 5th January, 1910. By his will, dated the 30th September, 1909, the testator, after appointing his sister, Mary Caroline Gabbett (since deceased), and Richard Heard, to be executors and trustees of his will, proceeded as follows:—"I give, devise, and bequeath my property in the county of Limerick . . . which is being sold to the tenants under the Land Law (Ireland) Act, 1903, and the proceeds thereof when sold unto my trustees upon trust to sell, call in and convert into money the same, and after payment of all charges affecting same to invest the residue of the moneys produced by such sale in some or one of the securities authorised by law for investment of trust funds, with power for my trustees to vary such investment, and shall stand possessed of the residue of the said moneys produced by such sale and the investments for the time being representing the same upon the trusts following, in trust to pay the income to my sisters, Wilhelmina Jane Gabbett and Mary Caroline Gabbett during life and from and after the decease of the survivor of my said sisters as to all said property in the county of Limerick, . . . and the proceeds thereof and the investments for the time being representing the same in trust for my cousin, Wyndham Gabbett,

Ross J. 1915. HEARD v. GABBETT.

absolutely, and as to all the rest, residue, and remainder of my property not otherwise disposed of by this my will, I give and bequeath the same to my said sisters . . . in equal shares." . . .

At the time of his death the testator was possessed of the following property situate in the county of Limerick, viz.:—Part of the lands of Caherline, containing in all 961 acres, in respect of which the testator had entered into agreements for sale to his tenants under the Irish Land Act, 1903. The sales to the tenants were completed subsequently to the death of the testator. On the completion of the sales the bonus or percentage payable out of the Lands Purchase Aid Funds, amounting to £2482 11*s.* 1*d.*, was paid to Richard Heard as personal representative of the testator.

Wyndham Gabbett, by indenture dated the 23rd June, 1913, assigned to Miss Lily A. Westropp, his then intended wife, all his share and interest under the will of Thomas Richard Gabbett, to hold in fee-simple. Wyndham Gabbett subsequently intermarried with Lily A. Westropp, and died, leaving Lily A. Gabbett him surviving.

By indenture dated the 27th January, 1915, Richard Heard, as surviving trustee of the will of Thomas Richard Gabbett, appointed the Rev. Henry E. Ruby, one of the plaintiffs, to be a trustee of the will in place of Mary Caroline Gabbett, deceased.

The plaintiffs, Richard Heard and the Rev. Henry E. Ruby, the surviving executor and the trustees of the will, brought the present summons against Wilhelmina Jane Gabbett and Lily A. Gabbett, widow of Wyndham Gabbett, for the determination of the following question (among others) arising on the will:—"On the true construction of the will do the words 'my property in the County of Limerick . . . which is being sold to the tenants under the Land Law (Ireland) Act, 1903, and the proceeds thereof' include the percentage paid under the Irish Land Act out of the Land Purchase Aid Fund on the sale of the lands of Caherline and others in the Irish Land Commission?"

Littledale K.C. and *Peart*, for the plaintiffs.

H. D. Conner K.C. (with him *H. L. Conner*), for Wilhelmina Jane Gabbett, residuary legatee under the will:—

The bonus was held to be part of the lands by Eve J. in

Tremayne v. *Rashleigh* (1). This case was considered by Wylie J. in *In re Shelton's Estate* (2), and was further considered by this Court in *In re Hillas's Estate* (3), where it was laid down that the bonus was distinct from the purchase-money; and the same view was taken by the Court of Appeal in *In re Grant's Estate* (4). The words in the will "the lands and the proceeds thereof" cannot include the bonus.

Edward Fitzgerald, for Lily A. Gabbett:—

The word "proceeds" includes the bonus. In the Oxford Dictionary it is defined as "that which proceeds, is derived, or results from something." The testator intended this construction, for he says, "the proceeds thereof when sold." In *In re Ely's Estate* (5) the bonus is called a "by-product" of the sale. See also *In re Power's Estate* (6).

Ross J.:—

As far as I am concerned, this case is already covered by authority. I held in *In re Ely's Estate* (5) that the percentage was distinct from the purchase-money; that it was a by-product of the sale; that equity would not allow the tenant for life to appropriate it to his own use; and that he was bound to hold it in trust for other parties interested in the estate as well as for himself. I never decided or held that it was an interest in the lands. On the contrary, I held that it was a personal thing given to a vendor to induce him to sell. I am unable to agree with the view of Eve J., in *Tremayne* v. *Rashleigh* (1). I think that my view is taken by the Court of Appeal in Ireland, for in *In re Carroll's Estate* (7) the Court of Appeal held, affirming my decision, that, notwithstanding a Board of Works charge which the purchase-money was insufficient to discharge, the bonus must be paid to the vendor's executors to the exclusion of the Board of Works. If the bonus had been an interest in the lands, it would undoubtedly have been subject to the Board of Works charge.

(1) [1908] 1 Ch. 681.
(2) [1910] 1 I. R. 161.
(3) [1911] 1 I. R. 11.
(4) [1913] 1 I. R. 414.
(5) [1904] 1 I. R. 66.
(6) [1907] 1 I. R. 51.
(7) [1906] 1 I. R. 661; [1907] 1 I. R. 148.

Ross J.
1915.
HEARD
v.
GABBETT.

Applying this view as to the bonus to the present case, the testator, by his will, gives his property in the county of Limerick which, he mentions, was being sold to the tenants under the Land Law (Ireland) Act, 1903, "and the proceeds thereof" to the trustees upon certain trusts. The words "and the proceeds thereof" do not widen the meaning, nor have the further words used by the testator, "moneys produced by such sale," any widening effect. The bonus, as I have already said, is no part of the lands. Therefore I am of opinion that the bonus does not go with the bequest of the lands and proceeds, but passes under the residuary gift in the will.

Solicitor for the plaintiffs: *Richard A. Macnamara.*
Solicitor for Wilhelmina Jane Gabbett: *Frederick Hall.*
Solicitors for Lily A. Gabbett: *D. & T. Fitzgerald.*

D. M. S.

[HOUSE OF LORDS.]

H. L.
1915.
March 3, 4, 25.

MARRON, APPELLANT, AND THE COOTEHILL (No. 2) RURAL DISTRICT COUNCIL, RESPONDENTS (1).

Local Government—Labourers (Ireland) Acts—Labourer's Cottage—Preference on First Letting—Right to Particular Cottage—Discretion of District Council—Letting to Labourer on whose behalf no Representation had been signed—Labourers (Ireland) Act, 1906 (6 *Edw.* 7, *c.* 7), *s.* 29—*Effect of Section apart from Regulations made under it.*

A district council had acquired land under an improvement scheme made under the Labourers (Ireland) Acts, and founded on "representations" made by certain agricultural labourers, of whom the appellant was one. When eight cottages, out of a large number comprised in the scheme, had been built, the council allotted one of them to K., an agricultural labourer, who had not signed any of the representations on which the scheme was founded, but whose needs were more urgent than the appellant's. Prior to the erection of the remaining cottages under the scheme the plaintiff brought an action against

(1) *Present*: VISCOUNT HALDANE L.C., LORD DUNEDIN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR. The judgments are printed from a transcript supplied by Messrs. W. B. Gurney & Sons.

the council for a declaration that, under sub-s. 2 of s. 29 of the Labourers (Ireland) Act, 1906 (1), he was entitled to a preference as against K, or any other person on whose behalf no representation was lodged, to be admitted as tenant on the first letting of the cottage, and claiming possession and an injunction and damages.

Held, affirming the decision of the Court of Appeal in Ireland, [1914] 1 I. R. 208, that the plaintiff's action was not maintainable.

Held, by Viscount Haldane L.C., Lord Dunedin, Lord Atkinson, Lord Parker of Warrington, and Lord Parmoor, that the appellant had not a preferential right to any particular cottage. *Condon* v. *Mitchelstown Rural District Council*, [1914] 1 I. R. 113, 118, approved.

Held, by Lord Dunedin, Lord Atkinson, Lord Sumner, and Lord Parmoor, that the preference on the first letting of cottages to labourers on whose behalf representations have been made, referred to in s. 29 of the Labourers (Ireland) Act, 1906, is not an absolute preference, but only a preference *caeteris paribus*.

Quaere, per Lord Atkinson, does s. 29, apart from regulations made under it, confer a right of preference?

APPEAL, *in forma pauperis*, from a decision of the Court of Appeal in Ireland reversing the judgment of the Master of the Rolls (reported [1914] 1 I. R. 201, 208) in an action wherein the appellant was plaintiff and the respondents were defendants.

The plaintiff claimed in the action:—1. A declaration that he was entitled, in preference to Joseph Kennedy or any other person on whose behalf no representation was lodged, to be admitted as tenant to the defendants upon the first letting by the defendants of a certain labourer's plot and cottage, situate in the townland of

(1) Labourers (Ireland) Act, 1906, s. 29: "(1) The district council shall make regulations with respect to the letting of cottages and allotments under the Labourers Acts, and for preventing any undue preference in the letting thereof, and generally for carrying the provisions of the said Acts into effect."

"(2) Regulations under this section shall provide that, on the first letting of any cottages or allotments comprised in a scheme, preference shall be given to agricultural labourers who have signed on their own behalf the representation on which the scheme was founded, or on whose behalf that representation was made."

"(4) Regulations under this section shall not be of any force until confirmed by the Local Government Board, in like manner and subject to the like provisions as in the case of by-laws under the Public Health (Ireland) Act, 1878."

H. L. 1915.

MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

Aughnamullen, Electoral Division of Anny, and erected by the defendants, pursuant to the Labourers (Ireland) Acts, 1883 to 1906, on the said plot. 2. To be put into possession of the said plot and cottage as tenant to the defendants, upon signing the usual contract of tenancy. 3. An injunction to restrain the defendants from letting, continuing to let, or attempting to let, the said plot and cottage to any person other than the plaintiff, or otherwise attempting to defeat the right of the plaintiff to such preference. 4. An injunction to compel the defendants to make a letting of the said premises to the plaintiff, and for this purpose to do all necessary acts for obtaining vacant possession thereof, and for determining all (if any) lettings, or attempted lettings, thereof. 5. Damages. 6. Further or other relief. 7. Costs.

The material facts are set out in the report of the case before the Master of the Rolls and in the Court of Appeal, [1914] 1 I. R. 201, 208, and in the judgment of Lord Atkinson, *infra*.

The Master of the Rolls made an order declaring the plaintiff entitled, in preference to Joseph Kennedy or any other person on whose behalf no representation was lodged, to be admitted as tenant to the defendants upon the first letting by the defendants of the plot and cottage in question. He made no order as to possession of the said plot and cottage, or for letting the same to the plaintiff, the said Joseph Kennedy not being a party to the action. He declared the plaintiff entitled to the sum of £30 damages, to be paid by the defendants, and the costs of the action.

The defendants appealed to the Court of Appeal. The Court of Appeal reversed the judgment of the Master of the Rolls, and ordered that the action should be dismissed with costs.

The plaintiff appealed *in forma pauperis* to the House of Lords.

Serjeant Sullivan K.C., and *D. J. O'Brien K.C.* (with them *J. T. Donovan*), for the appellant.

Jellett K.C., *Gerald Fitzgibbon K.C.*, and *E. S. Murphy*, for the respondents, were not called on.

The House took time for consideration.

VISCOUNT HALDANE L.C.

My Lords, I think that this appeal ought to fail, and I rest this conclusion on reasons which I can express briefly.

The Master of the Rolls made a declaration that the appellant was entitled, in preference to Kennedy or any other person on whose behalf no representation was lodged, to be admitted as tenant of the plot and cottage in question, and awarded the appellant £30 as damages. The Court of Appeal reversed this judgment. I have come to the conclusion that the Court of Appeal was right.

Section 29 of the Labourers (Ireland) Act, 1906, begins by imposing on the district council the duty of making regulations with respect to the letting of cottages and allotments under the Labourers Acts, and for preventing any undue preference in the letting, and generally for carrying the provisions of these Acts into effect. It then goes on to enact that these regulations shall provide that, on the first letting of any cottages or allotments comprised in a scheme, preference shall be given to agricultural labourers who have made the representation on which the scheme was founded, or on whose behalf the representation was made.

My Lords, I can conceive a case in which a labourer, belonging to the class defined, by the making of a representation would be entitled to a mandamus to compel the council to make regulations. It is also possible—it is not necessary to express an opinion on the point—that such a labourer might be entitled to an injunction in a case where the council was so proceeding as to deprive him of all chance of a letting. But I am unable to find in the section language which entitles the labourer to assert title to a specific holding in a case like the present. The scheme here provided for the erection of twenty-five cottages. The right of the appellant is not to any particular cottage, but to a preference over strangers in the carrying out of the scheme as a whole. Assuming, for the sake of argument, that it was wrong to let to Kennedy, in so far as some person in the class entitled would thereby be left unprovided for, it does not follow that the appellant was injured. For he had no title to the particular cottage allocated to Kennedy, and his right might have been satisfied by the allocation of some

H. L. 1915.

MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

Viscount Haldane L.C.

other cottage. I have read the section as intended to give to the council a discretion as to how a scheme is to be carried out in detail, provided the general principle laid down in the section is adhered to; and I do not find it proved that the principle has been, or will be, departed from in this case. I therefore think that neither the declaration of title to the specific cottage, made by the Master of the Rolls, nor his award of damages, can be supported.

I have only to add that the case attempted to be made as to want of bona fides in the exercise of their discretion by the council appears to me to fail. The members may have given wrong reasons for what they did, but they acted within their powers, and legitimately.

I move accordingly.

LORD DUNEDIN:—

My Lords, the plaintiff, an agricultural labourer on whose behalf an application was lodged to be admitted as tenant on the first letting of a certain labourer's plot and cottage, which formed part of an improvement scheme promoted by the defendants, the rural district council, and confirmed by the Local Government Board, was not admitted as tenant to that plot, one Kennedy being preferred to him. In this action he asks, first, for a declaration that he is entitled to a preference as against Kennedy or any other person by whom or on whose behalf no representation had been signed; second, for an order putting him in possession of the plot on his signing a lease; third, for an injunction against the defendants letting the plot to any other than him; and, fourth, for damages.

The learned Master of the Rolls, before whom the case depended, gave him the declaration asked for, and £30 damages, but refused the further relief on the ground that Kennedy was not cited as a party to the action. The Court of Appeal reversed that judgment, and dismissed the case.

My Lords, the plaintiff's whole case is rested upon sub-s. 2 of sect. 29 of the Act of 1906, which I need not quote again. Now, it is quite clear that whatever right it gives, it cannot give a right to a specific cottage being one out of a number in a scheme. The

judgment of the Irish Court of Appeal in *Condon's Case* (1) was, I think, clearly right; and if that is so, it seems to me to follow that it is quite impossible to give the plaintiff damages. Granted that Kennedy was unduly preferred to him, how does it follow that someone else, with the qualification that Kennedy did not possess, may not, with Kennedy out of the way, still be preferred to the plaintiff? The position is analogous to that in decided cases where a disappointed candidate at a bursary election has failed to secure damages against the electing body, even although the person actually elected, being ineligible, was not found able to hold the bursary. And how can we tell if the plaintiff will not yet be offered some other cottage in the scheme? So much for damages.

As regards the declaration, standing by itself it is but a Pyrrhic victory, for, for the reasons already given, it cannot be translated into any active relief. But is he even entitled to the declaration as it stands?

My Lords, I confess that on first impression I was inclined to think that the preference given (which ought to be included in the regulations when made, and which I will for the moment assume, without deciding, is just as efficacious as if the regulations had *de facto* been passed) by the second sub-section of sect. 29 is an absolute preference. But, on maturer consideration, I have come to think that the view taken by the Court of Appeal is right, and that the mere fact of being a signatory to the representation, or one on whose behalf the representation was made, does not override all other considerations of fitness and expediency. In other words, that all it means is that, *caeteris paribus*, the council is to give a favouring consideration to the man's application.

I think, therefore, that the judgment appealed from is right, and ought to be affirmed.

LORD ATKINSON:—

My Lords, this is an appeal from an order of the Court of Appeal in Ireland, dated the 16th February, 1914, whereby a judgment of the Master of the Rolls in Ireland was reversed, and

(1) [1914] 1 I. R. 113, 118.

H. L. 1915. MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

Lord Atkinson.

the action of the plaintiff dismissed with costs. The action so dismissed was brought to recover damages for the breach by the respondents of a duty alleged to be imposed upon them by sub-s. 2 of sect. 29 of the Labourers (Ireland) Act, 1906 (6 Edw. 7, c. 37).

The breach complained of consisted in this, that the respondents had let to one Joseph Kennedy, instead of to the plaintiff himself, a certain cottage with a plot of ground attached, which cottage had been erected under a scheme passed by the respondents for the improved housing of agricultural labourers in the Anny electoral division of the Cootehill (No. 2) Rural District. The relief prayed for in the statement of claim was—(1) a declaration that the plaintiff was entitled in preference to the said Joseph Kennedy (on whose behalf no representation had been lodged) to be admitted as tenant to this cottage on the first letting thereof; (2) to be put into possession of this cottage, and the attached plot, upon signing the usual contract of tenancy; (3) an injunction restraining the respondents from letting, or continuing or attempting to let, this cottage and plot to any person other than the plaintiff; (4) an injunction to compel the respondents to let the same to the plaintiff, and for that purpose to do all necessary acts; (5) damages; (6) further relief.

The relief asked for in the statement of claim is based upon the absolute right of the plaintiff to obtain, as tenant, possession of this particular cottage, and to have Kennedy evicted therefrom. His right to have that particular relief was the right alleged to have been violated; and unless the respondents were, in the circumstances disclosed in the case, under a statutory duty to accept him as tenant of the particular cottage, he had no right whatever to obtain either the injunction he asked for or to recover damages. In the result the Master of the Rolls did not grant an injunction, but awarded the plaintiff £30 damages, without, as far as I can see, a particle of proof that the plaintiff had, by reason of the respondents' alleged breach of duty, sustained any estimated damage whatever.

It is right to point out that the statement of claim contains no averment whatever that the respondents acted fraudulently or corruptly, or in any respect mala fide, and it cannot be permitted

that, in argument, the plaintiff should, through his counsel, insinuate what he has not dared positively to assert. There is no proof of any mala fides on the part of the respondents; and it has been recently decided in your Lordships' House that it must be presumed in the case of public bodies, such as these, that they have acted bona fide till the contrary be proved. It has, however, been averred in the statement of claim that this Joseph Kennedy was not an agricultural labourer within the definition contained in the Labourers Acts. That was traversed in the defence. Three witnesses have given evidence in support of this traverse, and the Master of the Rolls, who saw and heard the witnesses, in speaking of Kennedy, says: "This man, who is also an agricultural labourer, is not one of those by whom, or on whose behalf, the representations were made which led to the improvement scheme. He was, in fact, a stranger to it, and may, so far as the scheme is concerned, be described as a complete outsider." With all respect to the learned Master of the Rolls, this last sentence is, in my view, somewhat misleading. Kennedy possessed the only qualification needed to be accepted as a tenant of one of these cottages, *i.e.* that he was an agricultural labourer (see section 13, Labourers (Ireland) Act, 1883, and section 16, Labourers (Ireland) Act, 1885. There is nothing in these Acts requiring that an applicant for a cottage should be connected with the promotion of the scheme, or should be resident in or connected with the area it covers.

Prior to the year 1883, many attempts had been made to provide for the proper housing of agricultural labourers in Ireland. They proved to a great extent abortive. The Act of 1883 inaugurated a new system. It threw upon the sanitary authority in rural areas, then the board of guardians, now the district council, the duty of solving the problem. These bodies were, however, only called upon to act, or were only justified in acting, when a representation had been made to them: Labourers (Ireland) Act, 1883, s. 4. Elaborate provision was made in the following section, section 5, now repealed, as to the form and contents of this representation. One of these requirements was that the representation should define the section to which the scheme was to apply, and contain a suggestion on the part of

H. L. 1915.

MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

Lord Atkinson.

the signatories as to the locality or localities suitable for the erection of the new dwellings. It has been held that unless these sites are indicated the representation is invalid. But all that has been changed by the statute of 1906. A district council may now make an improvement scheme under these Acts for the whole or any section of their district without having received any representation whatever in relation to it: s. 3. And a representation will be sufficient for all purposes if it should merely represent that the circumstances of the portion of the rural district to which it relates are such that it is the duty of the district council to take thereon proceedings under the Labourers Acts: s. 1. Representations, therefore, are no longer the necessary preliminaries to action. All suggestion as to sites is surplusage. It is quite true that the form of representation to be found in the schedule to the Act of 1906 contains a suggestion such as is required by the Act of 1885, section 5. But the use of these forms is not obligatory (Appendix A, Rule 2), and the suggestion has no binding force whatever. It does not mark out a particular cottage for the use of anyone. In fact, the representation does little more than call the attention of the council to a particular state of things so that they may investigate them and find a remedy if needed.

Now in the present case seventy-four representations were sent in dealing with seven electoral divisions (twenty-one of which related to the Anny electoral district), and at the meeting of the district council on the 17th May, 1907, the scheme prepared by their clerk for the building of fifty-one cottages, and the acquisition of fifty-one plots, twelve allotments, and twelve allotments for cottages not belonging to the council, was adopted. Amongst these seventy-four were two dealing with a farm twelve acres in extent belonging to a farmer named James Carey, situate in the townland of Aughnamullen, the one suggesting that a cottage with a suitable plot attached should be built on the farm for the appellant, and the other making a similar suggestion in favour of one Patrick Clarke.

The inspector of the Local Government Board thought, apparently, that it was unreasonable to build two cottages on such a small farm, and only recommended the erection of one

cottage upon it. And ultimately the Board approved of a scheme for the erection of twenty-five cottages in all. No particular cottage was designated for the appellant in this order, nor was any right or privilege mentioned in it as belonging to him. This was as it should be, since it is the function of the district council, not of the Local Government Board, to select the tenants of the cottages they build. By the month of July, 1912, five of these cottages, including that on Carey's farm, had been completed, and three more were in course of erection. Before the 2nd August, 1912, Clarke had left the county and emigrated to America. He no longer sought to be accepted as a tenant of any cottage. This James Kennedy, who resided within the rural district of Cootehill (No. 2), had, in fact, sent in a representation that a cottage might be built for him in the Anny electoral division, but that cottage was not included in the scheme ultimately approved of. He accordingly, by letter, applied to be put into possession of the cottage built on Carey's land, as did also the appellant. At the meeting of the respondent council, held on the 2nd August, 1912, the letting of this cottage for the first time was taken into consideration. The appellant appeared in person to support his application, and the following resolution was carried: "Seconded by Mr. R. Harrison—that Joseph Kennedy of Corfad be given the labourer's cottage in the townland of Aughnamullen in so far as he is a married man with a wife and family and a bona fide labourer in the Union of Cootehill, the other applicant being a single man and not residing in the Union. Which was carried that J. Kennedy get the cottage by 6 to 4, he attending on Tuesday 6th inst. to sign bond and get key." Kennedy on the same day entered into an agreement with the respondents to become tenant of the cottage with the attached plot at a rent of 1*s.* 3*d.* per week, and was put into possession.

The reason given for selecting Kennedy as the tenant rather than the appellant, who is the other applicant referred to in the resolution, may have been a good or a bad reason, but there is nothing to show that the respondents did not think it was a good and valid reason, and did not act honestly and without prejudice in passing the resolution; and, moreover, abundant evidence was given before the Master of the Rolls that Kennedy's

H. L. 1915. MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL, Lord Atkinson.

house was in a most insanitary condition; that the appellant lived with his brother in a house which was not insanitary; was himself unmarried and had no special need at the moment of a cottage of his own. In addition, two of the members of the council had visited Kennedy's cottage and seen its condition. The respondents, in the sixth paragraph of their defence, aver that they have been always ready and willing to give to the plaintiff a preference in the letting of the cottages comprised in this scheme, and to make a letting to the plaintiff of another of these cottages with an allotment attached on completion.

Section 29 of the Act runs as follows:—

"1. The district council shall make regulations with respect to the letting of cottages and allotments under the Labourers Acts, and for preventing any undue preference in the letting thereof, and generally for carrying the provisions of the said Acts into effect. 2. Regulations under this section shall provide that, on the first letting of any cottages or allotments comprised in a scheme, preference shall be given to agricultural labourers who have signed on their own behalf the representation on which the scheme was founded, or on whose behalf that representation was made."

The only regulations made under this section were not approved of by the Local Government Board till the 16th day of September, 1912, and did not, therefore, come into force till that date; but it is clear that whatever regulations might be made under this section, they could not confer upon a person on whose behalf a representation was made a greater right or privilege than that which the statute itself would authorize.

It has, in the proceedings in this case, been assumed that it is the section of the Act itself, not the regulations made under it, which confers these rights and privileges. It has been so decided in the case of *Tevlin* v. *The Lisnaskea Rural District Council* (1). It is more satisfactory under these circumstances to assume, in the present case, that this is the correct construction of the statute. I confess, however, for myself that this view appears to me very

(1) [1914] 2 I. R. 15.

questionable. It is, no doubt, quite true that the district council should not be permitted, by their neglect or omission to make regulations, to defeat the right of the persons by whom or on whose behalf a representation has been made, but the answer to that is that the council can, by proper proceedings, be compelled to discharge their duties in this regard and to make regulations. I express no definite opinion upon this point (it is not necessary to do so in this case), but hold myself entirely free to consider it on a future occasion.

Now, the agricultural labourers, by whom or on whose behalf a representation is made, styled in the agreement for convenience sake by the rather ineuphonious name of representators, are no doubt a small class, ascertained or readily ascertainable; a certain privilege is conferred upon them exclusively, and a duty towards the members of the class is imposed upon district councils different from that which the councils owe to the members of the general public.

It may well be that by reason of this fact a member of this class is entitled to sue a council in respect of their breach, in his regard, of this special duty; but the important question remains, what is the true nature and precise extent of this special duty imposed by the statute? First of all, the representators are, neither upon the first occasion of letting the cottages built under a scheme, nor on any subsequent occasion, entitled to an undue preference. For instance, the mere fact that a representation had been made by or on behalf of a certain agricultural labourer who might already be well housed, might be of dissolute habits, and inefficient as an agricultural labourer, could not, *per se*, I think, entitle him to have his claim to a certain cottage acceded to in preference to the claim of a competitor who was of regular habits, was a more efficient agricultural labourer, and who and whose family were housed, to the danger of their health, in an insanitary dwelling. That would be, having regard to the whole object and purpose of these Labourers Acts, to give to the representator an undue preference, the very thing that must not be done.

The preference, therefore, which the district council is, under sub-section 2, bound to give to the class of representators on the

H. L. 1915.

MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

Lord Atkinson.

occasion of the first letting of any cottages or allotments under a scheme, must be something less than, and different from, an undue preference; and, speaking for myself, I confess I have great difficulty in seeing how a preference would, in any particular case, not be undue where the claims of the representator as an agricultural labourer to be adequately housed were inferior to those of a like character of one of his competitors who was not a representator.

In an individual instance a preference given to a representator over a non-representator, *caeteris paribus*, would appear to me to be a due preference, but, *caeteris imparibus*, an undue one. I think, moreover, that it must be left to the district council in each case in the unprejudiced, honest, and bona fide exercise of their functions, to decide upon the merits of the above-mentioned character of the respective applicants. The proper administration of these statutes by district councils would, I think, be impossible, and, indeed, their object would be to a great extent defeated, if the mere fact that a representation was sent in by, or on behalf of, a certain agricultural labourer, with or without a suggestion in his favour, was to prevail over every other consideration, and to secure for him the tenancy of a particular cottage, or, indeed, I think, of any cottage built under a scheme, no matter how strongly these other considerations might preponderate in favour of a competitor who happened not to be a representator. This sub-section 2 of section 29 was designed, no doubt, to encourage agricultural labourers to make, or have made on their behalf, representations, but that should not be permitted to defeat the main and paramount purpose and object of the whole code of Labourers Acts, namely, to provide for the adequate housing in each rural district of agricultural labourers sufficient for the needs of that district. While, if the rural district council were bound to give to the representator, in any given case, the particular cottage he represented should be built, or suggested should be built, for himself, their functions would become purely mechanical, and would be simply limited to registering, and as executive officers carrying out, the wishes of the representators, even though they might be thoroughly convinced that the preference they thereby gave was unjust,

unreasonable, and injurious, and I think, therefore, necessarily undue.

I quite concur with Lord Justice Holmes in thinking that one is not forced to adopt a construction of sect. 29 which would lead to such results while its language is open to another construction. In my opinion, therefore, the appellant's action, which is solely based upon the alleged statutory duty of the district council to have accepted him as tenant of the particular cottage built under the scheme on Carey's land, wholly fails. The district council owe the appellant no such duty. No right of which that duty is the correlative is conferred upon him.

I accordingly think that, on this ground by itself, the judgment appealed from was right, and that this appeal should be dismissed on the terms usual in such cases.

Upon the question of damages I wish to say that I presume the possession and enjoyment of a cottage such as that built on Carey's land with the proposed allotment attached at the low rent of 1*s.* 3*d.* per week or £3 5*s.* per annum, precarious as the tenure is, and stringent as are the covenants into which the tenant must enter, may be a thing of some value. If it were not, then the appellant, by his rejection, has suffered no loss and has no right of action for the breach of a statutory duty. The loss, if any, should be proved.

The letting cannot, under the 13th section of the Act of 1883, be made for a longer term than from month to month. The tenant cannot sub-divide, sub-let, or assign the tenement or any portion of it; he cannot let in conacre any part of the lands allotted to him; he cannot allow any part of the tenement to be occupied by a lodger; and on the breach of any one of these conditions the district council are bound to evict him by the cheap and easy process prescribed for the eviction of cottier tenants under sections 81 to 89 of the Landlord and Tenant (Ireland) Act, 1860.

According to the form prescribed in rule 42 of the rules passed under the Act of 1906, the letting is only to be made from week to week. In obedience to that rule the cottage was let to Kennedy only from week to week. The tenant is no doubt liable to the

H. L. 1915. MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL. Lord Atkinson.

payment of all rates and taxes, but upon what principle the Master of the Rolls, in the absence of all specific evidence on the point, came to the conclusion that the loss sustained by the plaintiff, in respect of his not having been accepted as tenant in preference to Kennedy, amounted to £30, over nine years' purchase of his rent, I am at a loss to understand. I concur with Lord Justice Holmes in thinking that the delay by the district council in carrying out this scheme was, in reality, due to the inadequacy of the sum they could obtain to finance it. No other motive or object is proved. If they have improperly delayed, they can be compelled by due process of law to proceed. The case of *Condon* v. *The Mitchelstown District Council* (1) was, I think, rightly decided; and I concur with Lord Justice Holmes in thinking that it is open to doubt whether such questions as were raised in *Condon's Case* (1) can be raised legitimately until the whole scheme has been carried out, or at least until a remnant of the cottages have been left untenanted, inadequate, owing to the acceptance of non-representators as tenants, to meet the claims of suitable and meritorious representators. It is not necessary in the present case to express any opinion upon that question.

LORD PARKER OF WADDINGTON (2) :—

My Lords, this case turns upon the proper construction to be given to the 29th sect. of the Labourers (Ireland) Act, 1906, which provides, in sub-s. 1, that "The district council shall make regulations with respect to the letting of cottages and allotments under the Labourers Act, and for preventing any undue preference in the letting thereof, and generally for carrying the provisions of the said Acts into effect," and sub-s. 2, that "regulations under this section shall provide that, on the first letting of any cottages or allotments comprised in a scheme, preference shall be given to agricultural labourers who have signed on their own behalf the representation on which the scheme was founded, or on whose behalf that representation was made." No such regulations are

(1) [1914] 1 I. R. 113, 118. (2) Read by Lord Parmoor.

to be of any force until confirmed by the Local Government Board.

In the present case the plaintiff complains that, in letting a certain cottage comprised in a scheme under the Act, the defendants have not given him the preference to which the Act entitles him. It appears, however, that at the date of the letting no such regulations, as provided by the 29th section, had been confirmed by the Local Government Board. If, therefore, the plaintiff has any cause of complaint, it can only be on the footing (1) that the regulations, if and when made and confirmed, must confer a preference in the precise words of sect. 29, sub-s. 2, and (2) that the action of the defendants has violated the preference created by these words.

My Lords, without expressing any opinion on the point, I will assume that the regulations, if made, must have conferred a preference in the precise words of sect. 29, sub-s. 2. Even so, however, I doubt whether the preference conferred is an absolute preference, or a preference only when other matters are equal. It is not contended, and could not, I think, be contended, that every labourer by or on whose behalf a representation was made is entitled to rent any particular cottage comprised in a scheme. It is, however, possible, and this was the construction for which the appellants' counsel contended, that all labourers by whom or on whose behalf representations have been made are, as a class, entitled to an absolute preference over labourers by whom or on whose behalf no representations have been made. I will again assume that this contention is correct, though I prefer to reserve my opinion on the point. On this assumption the plaintiff is claiming damages for disregard on the part of the defendants of a preference to which he is entitled, not individually, but only as a member of a preferred class, and a little consideration will, I think, show that no such action is maintainable. Suppose that the scheme provides for the erection of six cottages, and that there are six labourers by or on whose behalf representations have been made. When the first cottage is erected and has to be let, the six labourers, as a class, will be entitled to a preference over any labourer not a member of the class. If the district council

H. L. 1915. MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL. Lord Parker of Waddington.

propose to let the cottage to a person who is not a member of the class, it will be proposing to act in contravention of the Act, and might possibly be restrained by injunction; but if it actually did let the cottage to a person who was not a member of the class, no member of the class could prove that he was individually damaged. For *non constat* that the district council, if they had acted in accordance with the section, would have let to him rather than to any other member of the class. It is not even clear that any single member of the class would be damaged, for if any one member, when the time came, did not desire to rent a cottage, there would still be enough cottages for the other members. The same difficulty may be seen on examining the order made in this case by the Master of the Rolls. He declared that the appellant was entitled to the cottage in question as against the person to whom the cottage was actually let, and who was not a member of the preferred class, and he awarded £30 damages. It is clear, however, that if such declaration was right, every member of the preferred class was entitled to a similar declaration, and, if damage could be properly awarded, was entitled to similar damages; and this would be an absurd result.

For these reasons I think that the appeal fails, and should be dismissed.

LORD SUMNER:

My Lords, I agree, and after the exhaustive examination of this case by my noble and learned friend Lord Atkinson, I have but little to say.

The defendants must be deemed, in the plaintiff's favour, to have made regulations adequate to give effect to section 29. Their failure to do so cannot prejudice him. I will assume that such regulations, giving effect to sub-section 2, would run in the very words of the statute, though clearly other words might be used, and more than one way of giving effect to it might be found. The plaintiff could then truly say that on the occasion of the first letting of a cottage comprised in the scheme, he, on whose behalf the representation on which the scheme was founded had been

made, was not preferred to Kennedy, an agricultural labourer on whose behalf such representations had not been made. So far, I am inclined to think his action would not be premature, though his damages might be nominal only. Would this be enough? I think not. He must further establish that he was, under the circumstances, entitled to be preferred absolutely. I take this to be so, because the grounds given for letting the cottage to Kennedy were certainly such as the local authority might act on in their discretion, if they had any under the section, since their good faith is not now impugned.

If the Act intended to give to such persons as the plaintiff an absolute right to be preferred in such circumstances, I think that the natural way of doing so would have been (1) by way of direct enactment, binding the authority immediately, instead of by prescribing the purport of certain regulations to be made by that authority, so as to bind itself; and (2) by expressly enacting that, on the first letting of any cottage, the tenancy itself should be given to such a person as the plaintiff, if any, and not a mere preference in giving the tenancy. This is not conclusive, but I think it becomes so on considering the word "preference." In connexion with the performance of an administrative act the word "preference," as applied to the doing of the act, nominally imports a choice to do or not to do it which resides in the administrator, albeit subject to limitations.

This clearly is so under sub-section 1. The authority which must make regulations under which it will be impossible for it to be guilty of undue preference in letting, obviously is free to give effect to a preference when it is not undue. Sometimes someone must choose; at such times the defendants have to choose, subject to the regulations. If in sub-section 1 "preference" implies some choice on the defendants' part, and therefore some falling short of an absolute right to be preferred on the plaintiff's part, why should it be otherwise under sub-section 2? If an absolute preference were prescribed under sub-section 2, no doubt it would not offend against regulations made to satisfy sub-section 1, for being prescribed, it could not be undue; but in the absence of some qualifying and limiting adjective, I cannot, at any rate in

H. L. 1915.

MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

such a context, read "preference" as prescribing something absolute, and as precluding any element of choice in the authority which has to prefer. The Legislature requires of the local authority impartial administration. By sub-section 1, it bars the local authority's favourites; by sub-section 2, it recommends its own. When it desires to enact an order of precedence, it has, in section 7 of the Labourers (Ireland) Act, 1896, a model of the natural way in which to do so.

LORD PARMOOR:—

My Lords, the appellant brought an action against the respondents asking, *inter alia*, for a declaration that the plaintiff is entitled, in preference to one Kennedy, or other person on whose behalf no representation was lodged, to be admitted by the respondents as tenant, upon the first letting of a certain labourer's plot and cottage, erected by the respondents pursuant to the Labourers (Ireland) Acts, 1883 to 1906, being plot No. 52, Ordnance Survey 23, on the deposited maps, and to be put into possession of the said plot, and for damages. The learned Master of the Rolls held that the appellant was entitled to the declaration; that he would make no order as to the possession of the said plot and cottage; and that the plaintiff was entitled to the sum of £30 damages. This order was reversed in the Court of Appeal.

The Master of the Rolls came to the conclusion that the respondents had acted perversely, and with a desire to take an advantage of what was their own default or breach of duty, to enable them to allot the cottage to Kennedy rather than to the appellant; but, in my opinion, the evidence fails to establish any such case, and I think it right to express my entire agreement in this respect with the judgment of Lord Justice Holmes.

The question to be decided depends upon the construction of sect. 29, sub-ss. 1 and 2, of the Labourers (Ireland) Act, 1906. In sub-s. 1 the district council has a duty to make regulations with respect to the letting of cottages and allotments under the Labourers Acts, and for preventing any undue preference in the

letting thereof, and generally for carrying the provisions of the said Acts into effect. In sub-s. 2 it is enacted that the regulations under the section shall provide that, on the first letting of any cottages or allotments comprised in a scheme, preference shall be given to agricultural labourers who have signed on their own behalf the representation on which the scheme was founded, or on whose behalf that representation was made.

No regulations had been sanctioned by the Local Government Board when the appellant applied for the cottage in question, but it is unnecessary to express an opinion whether, in the absence of regulations, the action is competent, since I am clearly of opinion that the appellant fails on other grounds.

The appellant was a representator, and, therefore, entitled to the benefit of preference in accordance with sub-s. 2 of sect. 29. Sub-s. 2 does not give a right to a particular cottage, and I hold that the case of *Condon* v. *The Mitchelstown District Council* (1) was rightly decided. If the appellant has no right to a particular cottage, it is difficult to see what damage he would sustain; and in the present case the appellant has given no proof of having sustained any damages whatsoever.

A further point was much discussed during the argument before your Lordships' House on the construction of sub-s. 2 of sect. 29. It was argued on behalf of the appellant that the preference to be given to agricultural labourers who are representators was a mechanical preference, and that under no circumstances was any discretion left with the district council. I do not construe the sub-section in this way. No doubt the section directs that a preference shall be given to the representators, but this does not deprive the district council of all discretion, or make it impossible for them to consider the exceptional claims of a competing candidate. If there is such a discretion, the method of its exercise is for the district council, so long as they act bona fide. It is obvious that there were strong reasons in the present case for giving the cottage to Kennedy.

I agree with the decision of the Court of Appeal, and think that the appeal should be dismissed.

(1) [1914] 1 I. R. 113, 118.

H. L. 1915.

MARRON *v.* COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

Questions put:—

That the judgment of the Court below be reversed.

The Not Contents have it.

That this appeal be dismissed, without costs.

The Contents have it.

Solicitors for the appellant: *Munton, Morris, King, Gavan Duffy & Co.*, agents for *Blood Smyth & Co.*

Solicitors for the respondents: *Ellis, Munday, & Clarke*, agents for *Charles E. Murphy.*

J. G. T.

COCKBURN *v.* NEWBRIDGE SANITARY STEAM LAUNDRY COMPANY, LIMITED, AND LLEWELLYN.

(1913. No. 155.)

M. R.
1914.
April 29.
May 1, 6, 7.
June 5.

Appeal.
Oct. 28, 29.
Nov. 13.

Company—Shareholders—Action by, against Director and Company—Contract made by Director for Work to be done by Company—Retention of Moneys received—Agreement with Co-Directors not to account—Internal Management—Powers of Majority—Ultra Vires.

The managing director of a limited company carrying on a laundry business entered into contracts for laundry work in his own name on behalf of the company with a customer. The work was done by the company, and the director received the amounts due under the contracts, and paid over a portion to the company, but did not account for the amounts received by him. This was in consequence of an alleged arrangement with his co-directors that he was not to account for profits. The company declined to call upon the director for an account, whereupon two shareholders brought an action against the company and the director, claiming that the director was a trustee for the company of all moneys received under the contracts, and asking for an account. The company pleaded that the complaint was conversant with a matter of internal management over which the Court had no jurisdiction. The defence of the director was that if there was any cause of complaint against him, which he did not admit, it was only enforceable at the suit of the company.

Held, by the Master of the Rolls, that the complaint was a matter of internal management, and that the action could not be sustained.

Held, by the Court of Appeal, that the transaction was illegal and ultra vires, and (reversing the decision of the Master of the Rolls) that the action was maintainable, and the plaintiffs entitled to the relief sought.

TRIAL OF ACTION.

The following statement of facts is taken from the judgment of the Master of the Rolls:—

"The plaintiffs in this action are shareholders in the Newbridge Sanitary Steam Laundry Company, Ltd. The defendants are the company, and Thomas J. Llewellyn, who is the managing director. The claim made by the plaintiffs is that the defendant, Llewellyn, is a trustee for, and bound to pay over to, the company

M. R. 1914.

COCKBURN v. NEWBRIDGE SANITARY STEAM LAUNDRY CO., LTD.

all moneys received by him on foot of certain contracts made by him either in his own name or in the name of the company, the carrying out of which had been performed by the company; other consequential relief is also sought.

"The allegations in the statement of claim are that Llewellyn is the managing director of the company, and since the inception of the company entered into contracts in his own name on behalf of the company, and in particular with the War Office, for laundry work which was performed by the company; and that Llewellyn had not returned and made over to the company the full amount received on foot of the contracts, but retained, and claimed his right to retain, for himself, such portion of the amounts received under such contracts as he thought fit, and converted the same to his own use. It is also alleged that before action the plaintiffs' solicitors wrote to the company calling on them to compel Llewellyn to give an account of all moneys received by him on foot of the contracts; that no reply was made to this request; and that notice was then given to the company that proceedings would be instituted by the plaintiffs.

"To this statement of claim two separate defences have been filed, by the defendant company, and by the defendant Llewellyn. Both defendants have pleaded what is substantially the same legal defence, viz., that the action is not sustainable at the suit of the plaintiffs, who are only individual shareholders. The company puts this in the form of a plea that the complaint is conversant with a matter of internal management, over which the Court has no jurisdiction; while the plea of the defendant Llewellyn is that, if there is any cause of action against him, it is only capable of being enforced at the suit of the company.

"Both defendants have also raised the defence on the merits that the defendant Llewellyn, though he entered into contracts in his own name, handed over the entire profits thereof to the company, and duly accounted for all such profits. This defence, if proved, would be a complete answer to the action.

"The validity of the first defence might perhaps have been tested as on a demurrer. But, before considering it, it may be well to state shortly the main facts as proved in evidence.

"The company carries on the business of a laundry in Newbridge, a garrison town, and naturally looked to the War Office for an important part of its custom. The company did, in fact, do considerable work for the War Office, but, for some reason not satisfactorily explained, the contracts with the War Office were not made with the company, but ostensibly with the defendant Llewellyn in his private capacity, although he was not the owner of the laundry, being only the managing director of the laundry company.

"The contract prices were not disclosed to the company by Llewellyn, nor was he asked to disclose them. He never rendered any account of the moneys received by him on foot of the contracts, nor was he asked to do so. He simply credited the company with certain sums, which, admittedly, were not the full amounts received, and these were accepted by his co-directors without question as the moneys coming to the company on foot of the contracts.

"It was hinted rather plainly by counsel for the defendants that the explanation of this extraordinary way of doing business was the practice of giving secret commissions to army officials, who either had the disposal of contracts, or were in a position to influence those who had the disposal of them. There was, however, no evidence as to this, because the defendant Llewellyn, the only person who could give information as to the reason for not accounting for the full moneys received, refused to state what moneys he received and what moneys he deducted, claiming privilege on the ground that he might criminate himself. To say the least of it, this leaves the matter in a very unsatisfactory condition.

"Llewellyn's co-directors, who were the proper persons to call on him for an account, were the plaintiff, Louisa Cockburn, and a Mr. Thornton. Louisa Cockburn became a director because her deceased husband had been one, and for no other reason. She certainly did not in any way control the affairs of the company, and never inquired into them. She was a mere dummy. Thornton, the other director, was pretty much of the same character. He seems to have left everything to Llewellyn, and

M. R. 1914.

COCKBURN v. NEWBRIDGE SANITARY STEAM LAUNDRY CO., LTD.

apparently he discharged no duty to any person but himself, because, as a director, he got a reduction of 30 per cent. on his washing-bill, and even with that reduction paid only a composition on the amount which he owed the company.

"This is a picture in outline of what has been described as the internal management of the company."

The capital of the company consisted of 1990 ordinary shares of £1 each, and ten founders' shares of £1 each. There were only twelve shareholders. The plaintiff, Alexander Cockburn, held 100 ordinary shares, and the plaintiff, Louisa Cockburn, held 540 ordinary shares and four founders' shares. The defendant Llewellyn held 275 ordinary shares and two founders' shares, and members of his family held 475 ordinary shares.

Serjeant Matheson K.C., and *Dickie*, for the plaintiffs:—

No relief is asked against the company; it is only Llewellyn who is asked to refund and pay over money to the company. The company need not have taken up a hostile position; if they will not take action, the plaintiffs may. The plaintiffs want to get money for the company. This is not a question of internal management: *Burland* v. *Earle* (1); *Menier* v. *Hooper's Telegraph Works* (2); *Alexander* v. *Automatic Telephone Co.* (3).

The question is, Was the arrangement alleged to have been made at the meeting of directors valid? Clearly not. Llewellyn was disqualified to act as director, as he was concerned in the profits of a contract with the company, and thereby vacated his office: Table A of Companies Act of 1862, Article 67. There was no power to make any contract with him. Even if there was power, he was an interested party, and could not vote: *In re Greymouth Point Elizabeth Railway and Coal Co.* (4); *In re The British America Corporation, Limited* (5). Thornton was the only other director present, and one person cannot form a quorum: *Sharp* v. *Dawes* (6). A meeting of the company would have been of no

(1) [1902] A. C. 93.
(2) L. R. 9 Ch. 350.
(3) [1900] 2 Ch. 69.
(4) [1904] 1 Ch. 32.
(5) 19 T. L. R. 662.
(6) 2 Q. B. D. 26.

use here, because the majority of the shareholders would have been against the plaintiffs. Llewellyn and Thornton had the control of the shareholders. The majority could not bind the minority in a case of this kind. *Burland* v. *Earle* (1) is an authority that it is for the Court to decide whether the contract with Llewellyn was a valid contract. The correspondence shows that the company would not say whether they would call a meeting or take proceedings against Llewellyn.

The plaintiffs' action cannot be sustained, if it is a case of internal management, unless fraud or ultra vires can be shown; if necessary, that can be shown. But if it is not a case of internal management, and if the company will not bring the action, the plaintiffs can bring it. Otherwise the majority of the shareholders could deprive the minority of profits by handing over certain sums of money to individual members. See *Campbell* v. *The Australian Mutual Provident Society* (2) and *In re Consolidated South Rand Mines Deep, Limited* (3). Even if it were a case of internal management, the act done by Llewellyn in April, viz., entering into the contract, was ultra vires, and the action is sustainable. An agent must account to his principal for profits. If he makes a contract for his principal, he cannot afterwards agree with the principal that he, the agent, should not be bound to account. There could be no consideration for such an agreement. *Benson* v. *Heathorn* (4) shows that a director cannot make a profit, and must account for the profits of a contract entered into by him to be performed by the company, and that is so even though the company could not have made the profit: *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (5). The only cases in which a director can contract with the company are those mentioned in Article 57 of old Table A. The plaintiffs are entitled to an injunction to restrain Llewellyn from continuing to act as director: *In re The Bodega Company, Limited* (6); *Star Steam Laundry Co.* v. *Dukas* (7).

(1) [1902] A. C. 93.
(2) 77 L. J. P. C. 119; 24 T. L. R. 623.
(3) [1909] 1 Ch. 491.
(4) 1 Y. & C. C. C. 326, 341.
(5) 39 Ch. D. 339.
(6) [1904] 1 Ch. 276.
(7) 108 L. T. 367.

M. R. 1914.

COCKBURY v. NEWBRIDGE SANITARY STEAM LAUNDRY CO., LTD.

James O'Connor K.C., and *Cecil Fforde*, for the defendant company:—

Except in cases where fraud or collusion is charged against the company, a single shareholder, or a minority of shareholders, cannot bring an action against a director except in the name of the company. Fraud or collusion is not pleaded in this case, and consequently the action does not lie.

The question is limited to the military contracts made by the defendant Llewellyn on behalf of the company. The agreements were made by him directly with the military authorities, partly because the washing to be done was for hospitals, and partly because certain payments were made by him which could not be well made by the company. The agreement that Llewellyn was not to account to the company as to the profits or how they were made, was a beneficial one for the company. The plaintiffs were the only shareholders who objected to this agreement. It was a matter of the internal management of the company, and there is no power to interfere with the internal management of the company except where the persons whose acts are complained of are the majority of the shareholders, or are the majority of the directors. The power of a dissentient minority of shareholders to take proceedings is confined to a case of fraud or dereliction of duty: *Burland* v. *Earle* (1), per Lord Davey, at p. 93, following *Foss* v. *Harbottle* (2); *Campbell* v. *Australian Mutual Provident Society* (3). It is said that the company should have taken proceedings against Llewellyn, but there must have been such an overwhelming case against him that they were bound to proceed against him. If the agreement was ultra vires, no action could have been maintained as to it; if it was intra vires, it was made on behalf of the company with Llewellyn. He could have pleaded that the agreement was that he was not liable to account. A company is not bound to take action in a matter as to which a legitimate doubt may arise. The plaintiffs must show that the company have such a strong case against Llewellyn that the result of an action by the company against him would be practically a

(1) [1902] A. C. 93.
(2) 2 Hare, 461.
(3) 77 L. J. P. C. 119.

foregone conclusion. If the company had brought an action against him, they would have been non-suited. The company had the benefit of the arrangement; they could not say it was illegal, and ask him to account, when they had arranged with him that he was not to account. The approval of the majority of the shareholders is to be assumed from the fact that no objection was taken by the majority, and that they accepted the benefit of the contract. Llewellyn could have carried out the contract himself, he need not have agreed to give it to the company, and it was open to the company to agree to his terms that he should not be asked to account. Moreover, a company may not, for a variety of reasons, wish to bring an action, even though there be the probability of succeeding in it. The defendant, for instance, may not be a mark; or the company might lose more by invidious publicity than they could possibly gain by a judgment; or the result of the proceedings might be to disclose secrets of the company, the preserving of which are essential to its profitable working. The company may not have desired that its name should appear in the contracts with the War Office. The minority of shareholders could have had a meeting of the company summoned, but they did not, and the company could, at a general meeting, confirm the contract even now. It was only when the army pay officers were examined that any case was made against Llewellyn. There was a large difference between the amounts received from the War Office and the amounts paid by Llewellyn to the company, but that did not affect the case.

Carrigan K.C. (*D. J. O'Brien* with him), for the defendant Llewellyn:—

Whether the contract was legal or not, the plaintiffs have no more right to sue Llewellyn than if they were not shareholders. If the plaintiffs' contention is correct, any shareholder who was dissatisfied with the management of the company could bring an action. Fraud is not alleged. *Foss* v. *Harbottle* (1) decides that a dissenting shareholder cannot inquire into the affairs of the company unless he commands the majority of the shareholders. The principle

(1) 2 Hare, 461.

M. R. 1914.

COCKBURN v. NEWBRIDGE SANITARY STEAM LAUNDRY CO., LTD.

of that case was that the majority of the shareholders have the power to control the affairs of the company. Even if the contract is not strictly legal, the majority of the shareholders may condone it. If the majority of shareholders pass a resolution that an action be taken against a director, any one shareholder can sue as co-plaintiff with the company if the directors fail to give effect to the resolution. Mrs. Cockburn could herself have requisitioned and, if necessary, called a company meeting for the purpose of passing such a resolution. Her omission to do so, and the fact that the plaintiffs sue in their own names, are enough to show that they did not represent a majority; they represent 644 shares out of 2000. The onus is on them to show that they represent the majority. This sort of litigation at the instance of discontented individual shareholders, acting contrary to the wishes and interests of the majority, illustrates the necessity for the rule in *Foss* v. *Harbottle* (1) being maintained as a protection for the conduct of the business of companies and persons dealing with their directors and officers; otherwise, as pointed out in *MacDougall* v. *Gardiner* (2), a company would be liable to be involved in lawsuits whenever shareholders fell out over its business affairs.

Cur. adv. vult.

June 5.

O'CONNOR M.R., after stating the facts as above set out, proceeded as follows:—

It seems to me that in such circumstances the company, that is the corporate body, has a clear right to enforce an account from its managing director of the full sums received by him on foot of the contracts which admittedly were entered into by him on behalf of the company. But the present action has not been brought by the company. It has been brought by two individual shareholders, and the defendants say that they are not competent plaintiffs. This raises an important question to which I must now address myself. The case, as alleged and proved, is certainly one of gross default on the part of the defendant Llewellyn. It was his duty to keep accounts of all moneys received by him on behalf of the company. He kept no such accounts. Indeed his evidence

(1) 2 Hare, 461. (2) 1 Ch. D. 13.

was that he destroyed, and deliberately destroyed, all accounts relating to the contracts. *Omnia praesumuntur contra spoliatorem.* I will presume against him that in the taking of accounts a balance would be found in his hands which he would be liable to make good. But then that is not a liability to an individual shareholder, or even to all the individual shareholders. It is a liability to a wholly distinct legal entity, the company.

The company then is prima facie the proper party to enforce liability. The managing director is the officer and servant of the company. He is not, strictly speaking, the officer or servant of the shareholders. This being so, has not the company, acting in its corporate capacity, the right to say whether it will take legal proceedings against its officer to enforce a liability for a breach of duty? Has it not also the right, even in a case where a liability clearly appears, to determine whether it is in the best interests of the company to embark in litigation? Many considerations may very legitimately be weighed by a company, or by those acting for it, besides the success of a proposed action.

The legal expenses, the possibility of not being able to realize the judgment when obtained, the injury to the business of the company while the litigation was proceeding, the injury resulting from the publication of reprehensible conduct by the company's servants, are all matters which might legitimately and most properly lead those acting on behalf of the company to forego a right of action. If this was the view of the company in its corporate capacity, would it be open to an individual shareholder to bring an action on his own behalf and on behalf of all other shareholders? Surely this would be taking the management of the company from those to whom it is legally committed, and would expose both the company and its directors to litigation at the suit of every individual shareholder who thought an action ought to be taken in every case in which a right is violated.

This is the argument which is really behind the plea of the company in the present case, that the matter complained of is one of internal management, and not subject to the jurisdiction of the Court; and behind the corresponding plea of the defendant Llewellyn, that the claim, if sustainable, is only enforceable at the suit of the company.

M. R. 1914.

COCKBURN v. NEWBRIDGE SANITARY STEAM LAUNDRY CO., LTD.

The argument I have referred to is substantially that contained in the judgment of James L.J., in *MacDougall* v. *Gardiner* (1). He says at page 21 :—"I think it is of the utmost importance in all these companies that the rule which is well known in this Court as the rule in *Mozley* v. *Alston* (2), *Lord* v. *Copper Miners Company* (3), and *Foss* v. *Harbottle* (4), should be always adhered to; that is to say, that nothing connected with internal disputes between shareholders is to be made the subject of a bill by some one shareholder on behalf of himself or others, unless there is something illegal, oppressive, or fraudulent—unless there is something ultra vires on the part of the company *quâ* company, or on the part of the majority of the company, so that they are not fit persons to determine it; but that every litigation must be in the name of the company if the company really desire it. Because there may be a great many wrongs commited in a company—there may be claims against directors, there may be claims against officers, there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is a wrong to the company a subject of litigation, or whether it will take steps itself to prevent the wrong being done. If the majority of the company are really in favour of any particular shareholder who has been interfered with improperly, by misconduct of a director, by misconduct of a chairman, by misconduct of a meeting, or of certain shareholders at a particular date—if the company think that any shareholder has anything which ought to be made the subject of complaint, there is never any difficulty arising from the apparent possession of the seal by the directors, or from any such cause, in filing a bill in the name of the company, if the majority of the company desire it to be filed. Any one of the shareholders might have filed his bill in the name of the company, and then if the directors had said, 'You are not the company, the majority do not act with you, but with us'—the

(1) 1 Ch. D. 13.
(2) 1 Ph. 790.
(3) 2 Ph. 740.
(4) 2 Hare, 461.

Court would, as it has done in other cases, have taken the means of ascertaining which party it is, the plaintiff's or defendant's, which really represents the majority of the company." Mellish L.J. in his judgment (at p. 24) says:—"I am of the same opinion. I think it is a matter of considerable importance rightly to determine this question, whether a suit ought to be brought in the name of the company, or in the name of one of the shareholders on behalf of the others. It is not at all a technical question, but it may make a very serious difference in the management of the affairs of the company. The difference is this:—Looking to the nature of these companies, looking at the way in which their articles are formed, and that they are not all lawyers who attend these meetings, nothing can be more likely than that there should be something more or less irregular done at them—some directors may have been irregularly appointed, some directors as irregularly turned out, or something or other may have been done which ought not to have been done according to the proper construction of the articles. Now, if that gives a right to every member of the company to file a bill to have the question decided, then if there happens to be one cantankerous member, or one member who loves litigation, everything of this kind will be litigated; whereas, if the bill must be filed in the name of the company, then, unless there is a majority who really wish for litigation, the litigation will not go on. Therefore, holding that such suits must be brought in the name of the company does certainly greatly tend to stop litigation."

These principles were affirmed by the Privy Council in *Burland* v. *Earle* (1). Lord Davey, in his judgment, says at p. 93: "It is an elementary principle of the law relating to joint-stock companies that the Court will not interfere with the management of the company acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should, prima facie, be brought by the company itself. These cardinal

(1) [1902] A. C. 83.

M.R. 1914.

COCKBURN v. NEWBRIDGE SANITARY STEAM LAUNDRY CO., LTD.

principles are laid down in the well-known cases of *Foss* v. *Harbottle* (1) and *Mozley* v. *Aleton* (2), and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is a mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have had if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the power of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier* v. *Hooper's Telegraph Works* (3). It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act, when done regularly, would be within the powers of the company, and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish L.J. in *MacDougall* v. *Gardiner* (4)."

It may be said that the present case comes within the exceptions which are mentioned in the judgments I have just quoted. These exceptions are cases in which the acts complained of are of a fraudulent character, or ultra vires of the company. It is, however, plain that the fraud in respect of which the exception is made must be the fraud of the company controlled by the majority of the shareholders, and no such case has been presented by

(1) 2 Hare, 461.
(2) 1 Ph. 790.
(3) L. R. 9 Ch. 350.
(4) 1 Ch. D. 13, at p. 25.

the statement of claim. Neither is there any question of ultra vires, unless it can be said that inaction on the part of a company in not taking proceedings against a director who has committed a breach of trust is ultra vires.

If the majority of the shareholders, who ultimately are entitled to say whether or not the company should proceed against the defendant Llewellyn, are of opinion that he ought to be made liable, there is no obstacle (notwithstanding remissness or misconduct of directors) in the way of an action at the suit of the company. If, on the other hand, the majority do not think that it would be for the interests of the company to bring an action, they ought not to be overruled by a minority. It would be otherwise if the defendant Llewellyn controlled the majority of the shareholders and unfairly influenced them in his own interest. However, no such case as that has been made.

For these reasons I must dismiss the action, but without costs. I refuse to award any costs to either defendants on account of the character of the defence. In both defences it is alleged that the defendant Llewellyn had fully accounted. The evidence was that he deliberately abstained from accounting, and that his conduct was acquiesced in. The judgment of the Court will be, dismiss the action but without costs.

W. L.

The plaintiffs appealed to the Court of Appeal (1).

Serjeant Matheson K.C., and *Dickie K.C.* (*Overend* with them), for the appellants:—

The question here is not one concerning the internal management of the company, so as to bring the case within *Foss* v. *Harbottle* (2). In *Russell* v. *Wakefield Waterworks Co.* (3), Sir G. Jessel M.R. pointed out that the rule in *Foss* v. *Harbottle* (2) is not a universal rule, but one subject to exceptions, "and the exceptions depend very much on the necessity of the case; that is, the necessity for the Court doing justice." See also the judgment,

(1) In the Court of Appeal before O'BRIEN L.C., and HOLMES and MORIARTY L.JJ.

(2) 2 Hare, 461.

(3) L. R. 20 Eq. 474, at p. 480.

Appeal. 1914.

COCKBURN v. NEWBRIDGE SANITARY STEAM LAUNDRY CO., LTD.

of Stirling L.J., in *Towers* v. *African Tug Co.* (1). Here the company refuses to enforce an account from Llewellyn, or even to summon a meeting of the shareholders, and the plaintiff will be without remedy if the action be dismissed. In the case of *MacDougall* v. *Gardiner* (2), cited by the Master of the Rolls, James L.J. said that :—"Nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent—unless there be something ultra vires on the part of the company *qua* company, or on the part of the majority of the company." In *Alexander* v. *Automatic Telephone Company* (3), Lindley M.R. distinguished the case as one not of mere internal management, which the Court would leave to the shareholders to settle for themselves, but one in which there was a breach of duty to the company in "depriving it of the use of the money which the directors ought to have paid up sooner than they did." That decision shows that the present form of action is correct. In *Ferguson* v. *Wilson* (4), Lord Cairns (then Cairns, L.J.) held that in an action to restrain the doing of an unlawful act by a company, the directors were proper parties to the bill. See also *Burland* v. *Earle* (5). No resolution was ever, in fact, passed by the company empowering Llewellyn to expend moneys of the company without accounting for them; they cannot, therefore, rely on such an alleged agreement, which in any case would have been ultra vires on the part of the company and illegal.

The Solicitor-General (*James O'Connor K.C.*) (with him *Cecil Eforde*) for the company :—

There is no conspiracy here between the company and Llewellyn; it would be in the interests of the company to obtain from him as much money as possible; but if the plaintiff be successful, the company will be embarked upon doubtful litigation with Llewellyn, with little prospect of recovering anything, and the Court ought not to interfere with the decision of the

(1) [1904] 1 Ch. 558, at 570.
(2) 1 Ch. D. 13.
(3) [1900] 2 Ch. 56.
(4) L. R. 2 Ch. 77.
(5) [1902] A. C. 83.

company to lie by. That is a matter of internal management to be dealt with by the company alone. We say that there was a specific contract with Llewellyn, under the terms of which he was not to account to the company for moneys received by him, but was to pay over any balance remaining after he had made such payments as he thought fit. That would be a valid contract between individuals, and it is equally valid as between an individual and a company. In *Dominion Cotton Mills Co. and Others* v. *Amyot and Others* (1), Lord Macnaghten, after referring to the rule in *Foss* v. *Harbottle* (2), says:—"The cases in which the minority can maintain such an action are therefore confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate." The present case cannot be brought within these exceptions.

D. J. O'Brien K.C. (with him *Carrigan K.C.* and *Dixon*), for Llewellyn:—

The rule in *Foss* v. *Harbottle* (2) applies. Fraud against Llewellyn is not pleaded, nor is it proved. Even assuming he had acted wrongfully, the company is under no obligation to set the criminal law in motion against him. He acted all through for the benefit of the company, and the plaintiff participated in the profit gained. The majority of the shareholders did not gain, or seek to gain, at the expense of the minority, and there was nothing done ultra vires of the company. Therefore none of the exceptions to the rule apply. [They cited and discussed *Foss* v. *Harbottle* (2); *MacDougall* v. *Gardiner* (3); *Normandy* v. *Ind, Coope & Co., Ltd.* (4); *Pender* v. *Lushington* (5); *Dominion Cotton Mills Co. and Others* v. *Amyot and Others* (1); *Burland* v. *Earle* (6); and *Atwool* v. *Merryweather* (7).]

Serjeant Matheson K.C., in reply. *Cur. adv. vult.*

(1) [1912] A. C. 546.
(2) 2 Hare, 461.
(3) 1 Ch. D. 13.
(4) [1908] 1 Ch. 8
(5) 6 Ch. D. 70.
(6) [1902] A. C. 83.
(7) L. R. 5 Eq. 464 n.

Appeal.
1914.

COCKBURN
v.
NEWBRIDGE
SANITARY
STEAM
LAUNDRY
CO., LTD.

O'BRIEN L.C.:—

The principles of law applicable to cases of this kind are well settled and, indeed, as has been said, are elementary. The difficulty arises in applying well-settled principles to the particular facts of each case, and the only trouble in the present instance arises from the circumstance that the facts do not at once readily group themselves under any of the reported cases.

Thomas Llewellyn, one of the defendants, was a director of the Newbridge Sanitary Steam Laundry Co., Ltd., and acted, although not possibly legally qualified, as managing director. The business had been founded by the husband of Louisa Cockburn, the plaintiff, and on his death practically the entire management of the company was carried on by Llewellyn, and, as the Master of the Rolls accurately puts it, the plaintiff did not control the affairs of the company, never inquired into them, and was in fact a mere dummy; and I see no reason to form the conclusion, even if the question could affect the result, that she was in any way privy or party to the transaction which gives rise indirectly to the present claim.

Owing to the proximity of the large military establishments near Newbridge, the business carried on by the defendant company is large, and appears to have been very remunerative. In the years 1909, 1910, and 1911, contracts were entered into between the military authorities and the defendant Llewellyn in his own name, for washing to be done in connexion with the military hospital, and otherwise under circumstances which would make the War Office liable to pay large sums for laundry work.

It is not disputed that although Llewellyn's name only appeared in the contracts, he really entered into them on behalf of the company. The washing was done by the company, and the remuneration to be paid for the work done was earned by the company, and, prima facie, the whole of it should be payable to them. The amount admittedly received by Llewellyn from the War Department was £3268, and the amount which he paid into the coffers of the company was only £1038, leaving an extraordinarily large balance for which he refuses to account.

The plaintiffs, who hold a large number of shares in the company, but not a preponderating amount, seek to make him account, or, more simply, to pay to the company the money which he has received, and which he refuses to pay.

The Master of the Rolls came to the only conclusion that a court could come to, that, as between Llewellyn and the company, there could be no answer to the action if the company had been the plaintiffs, but he was pressed by, and yielded to, the argument that in substance this was merely an attempt to enforce by a member of a company a claim against a director which the company might lawfully and reasonably refuse to enforce; that accordingly the question was one merely relating to the "internal management" of the company, and therefore that a shareholder could not invoke the aid of the Court against the will of the company, and compel Llewellyn to account to the company.

There is no doubt as to the attitude of the company, because they appeared by counsel, and insisted that the action must be dismissed, as this was only a matter in which the proper tribunal to decide the question was the company itself.

There is of course no doubt that if this was merely a matter of "internal management" the decision of the Court below could not be disturbed, and the sole question that we have to determine is whether on the peculiar facts of this case this is a question of merely "internal management."

The rule of law and of good sense laid down in *Foss* v. *Harbottle* (1) is indisputable, but it is subject to the exception that where the acts complained of are of a fraudulent character, or beyond the powers of the company, the action may be maintained by a shareholder suing on behalf of himself and the other shareholders, the company being made a defendant in the action. *Dominion Cotton Mills Co., Ltd.* v. *Amyot* (2), and *Burland* v. *Earle* (3), are recent cases where the rule has been considered and expounded, and its limitations defined.

Let us now return to the evidence. The defendant Llewellyn refuses to disclose what he did with the money, because he says

(1) 2 Hare, 461.
(2) [1912] A. C. 546.
(3) [1902] A. C. 83.

Appeal. 1914.

COCKBURN v. NEWBRIDGE SANITARY STEAM LAUNDRY. CO., LTD.

O'Brien L.C.

that the disclosure might criminate him. Mr. Beck, the secretary of the company, says that it would be unwise to investigate Llewellyn's dealings, presumably because the criminality of some kind lying at the root would be laid bare. On being pressed, Llewellyn said that to give an account might incriminate him, because it would show that the differences in the amounts paid to the company and received by him had been disbursed in secret commissions, which of course would be a criminal offence. It is very hard to understand, even on the wildest scheme of bribery, that £2230 out of £3268 were paid in secret commissions, but it makes the case no better for Llewellyn that he claims the right of secrecy on this ground alone.

It has been argued most ingeniously by counsel for the company that there was a contract with Llewellyn, which it is suggested would be perfectly lawful, that he was to give the company whatever he thought right out of what he received. There is no evidence of such a contract having been made, even if it could lawfully be made; and the only question is whether, on the facts as we have now got them, it would be within the powers of the company to take up the attitude, "We will not inquire." If this company had entered into a contract with Llewellyn, giving him authority to commit a crime on behalf of himself and the company, such a contract would, of course, be absolutely illegal, and it requires no argument to see that it would be equally illegal to adopt such a contract either affirmatively or indirectly.

Illegality and ultra vires are not interchangeable terms, but it is difficult, if not impossible, to conceive a case in which a company can do an illegal act, the illegality arising from public policy, and act within its powers.

Dealing with a case not of this class, but of ultra vires unaffected by criminality, Lord Cairns says, in *Ashbury Railway Carriage & Iron Co.* v. *Riche* (1): "But, my Lords, if the shareholders of this company could not *ab ante* have authorized a contract of this kind to be made, how could they subsequently sanction the contract after it had, in point of fact, been made. . . .

(1) L. R. 7 H. L. 653, at p. 672.

It appears to me that it would be perfectly fatal to the whole scheme of legislation to which I have referred, if you were to hold that, in the first place, directors might do that which even the whole company could not do, and that then, the shareholders finding out what had been done, could sanction, subsequently, what they could not antecedently have authorized."

How much stronger is the position when the whole matter is tainted with criminality. The real agreement which it is suggested the directors did make in this case would have been an agreement, if made, so tainted with crime and so subversive of public policy as to be illegal in itself. It would, accordingly, have been quite beyond the powers of the company to have entered into it, nor could any memorandum or articles have given it power; it would be equally wrong for the company to ratify it, and it would be idle to give them an opportunity to vote on such a question, because the carrying of the resolution would be, in my judgment, nugatory as being illegal, and consequently wholly outside the powers of a company. To do a thing which would have for its main object either the commission of a crime, or the aiding or abetting of a crime, or the hushing up of a crime, could not be in any way within the powers of a company, and a matter of "internal management" in which the Court should not interfere.

In this view of the case I do not find myself constrained by the difficulties which affected the Master of the Rolls. I do not go into the question of the sufficiency or insufficiency of the demand which was made for the plaintiff on the directors to summon a meeting of the company. In the view that I take of the case it would not be within the power of the company either to make, ratify or adopt a proceeding of the scandalous character sought to be cloaked over in the present case by such a resolution.

The appearance of the company, and the arguments of the counsel, are sufficient in my judgment to justify the Court in holding that the plaintiffs are entitled to direct relief in the present case, and that an account should be directed against the defendant Llewellyn in respect of the moneys which the company

Appeal. 1914.

COCKBURN v. NEWBRIDGE SANITARY STEAM LAUNDRY CO., LTD.

earned by these contracts, and which he either received or ought to have received.

HOLMES L.J. :—

The litigants in this action are two shareholders of the defendant company ; the company itself ; and a shareholder named Llewellyn, who for some years was its managing director. The company was formed for the purpose of carrying on a laundry and other business mentioned in its memorandum of association ; but the present litigation relates only to certain laundry work done for the War Office. The defendant company is not a large one, its capital consisting of £2,000 in £1 shares, divided into 1990 ordinary shares and 10 founders' shares. There are cavalry barracks in the town of Newbridge, and probably one of the inducements for forming the company was the hope that it would be employed to carry out the washing required for the use of the soldiers occupying those barracks. Mr. Llewellyn was for some years the managing director, and he appears from the evidence to have been the only person connected with the company of business capacity ; but although I do not question his capacity, his mode of employing it left much to be desired. The allegations in the statement of claim are that Llewellyn, since the company was incorporated, entered into contracts in his own name on behalf of the company, and in particular with the War Office, for laundry work which was carried out by the company, and that he had not paid it the full amount received by him on the contracts. On the contrary, he claimed his right to retain for himself such portion of the amount received under such contracts as he thought fit. Whether Llewellyn claims to be entitled to act in this way in all the business of the company does not appear clearly from his own or other evidence, but he admits most candidly that this is the mode in which he dealt with the War Office contracts. He said in his examination that he had no book in which he recorded the amount of these contracts. He stated that he had no recollection of their amounts. The expenses were paid out of his own private bank account, although the company's bank was also his own. The contract prices were not disclosed to

the company by Llewellyn, nor was he ever asked to disclose them. He never rendered any account. He simply credited the company with certain sums which were admittedly not the full amounts received. These were accepted by his two co-directors, and, until this action, without question, as the moneys coming to the company on foot of the contracts. O'Connor M.R. evidently was astonished at the admissions made by the managing director, and he had no doubt that the company had a clear right to enforce an account from him of the full sums received by him on foot of the contracts which admittedly were entered into by him on behalf of the company.

The business of the company, before the company was incorporated, had been founded by William Cockburn some years ago. The plaintiff Louisa Cockburn is his widow, and the registered holder of some hundred paid-up shares, and the other plaintiff is her son, holding one hundred ordinary paid-up shares. There is no evidence that any of the Cockburns, up to a comparatively recent date, had any knowledge of the extent and character of the relations of the managing director with the War Office; but, some time before the end of January, 1913, they began to have suspicions. On the 24th of that month, their solicitor addressed a notice to the secretary of the company, calling on them to take all such proceedings as might be necessary against Llewellyn to enforce an account of all moneys received by him on foot of contracts carried out by the company for which Llwellyn had not returned the full amount received by him. No reply was given to this notice, whereupon the solicitor addressed a further notice to the secretary. This correspondence was brought to the notice of the managing director, who refused to give more than an acknowledgment of the letters, whereupon the writ in the present action was issued and served.

Up to a certain point at the trial there seems to be no serious controversy of fact. It is admitted by the defendants that although Llewellyn's name only appeared in the contracts, he really entered into them on behalf of the company. It is also admitted that the amount received by Llewellyn from the war department was £3268, and that of that sum there was only accounted for to the company the sum of £1030.

Appeal.
1914.
COCKBURN v. NEWBRIDGE SANITARY STEAM LAUNDRY CO., LTD.
Holmes L.J.

The Master of the Rolls was satisfied that, on the facts before him, the company was entitled to enforce an account. When the director who manages the business of a company, like that of this steam laundry, admits that he has entered into many contracts on behalf of the company, that he has been paid the contract prices, and that he has not accounted therefor, he could have no answer to an action of account by the company; and O'Connor M.R. would have so held, if such an action had been brought by them; but the difficulty he feels is that the company not only refuse to assist the plaintiffs, but, being named as defendants, actively defended the suit on the well-known legal ground that the matter in controversy relates to the mode of managing the company's business. The company may have such a question settled by action; but, if it does not desire to do so, one or more shareholders cannot, by constituting themselves plaintiffs, do so. There is, however, one well-recognized exception to this rule. Where the question involves the investigation of misconduct or criminality on the part of the company and one or more of its officers, or something ultra vires the company itself, the arm of the law cannot be stayed by the rule of law to which I have referred.

O'Connor M.R. was of opinion that there was no evidence of this exception in the present case, and he dismissed the action, but refused to award the defendants costs. On this point I have come to a different conclusion. The only evidence in favour of himself given by Mr. Llewellyn is that he neither kept nor used any of the contract prices for himself. This statement he repeated with much emphasis when he was in the witness-box. While denying so emphatically that he had appropriated any of the contract price for his own benefit, he did not deny that he had misapplied it. He declined to answer the simple question as to what he had done with the portion thereof which he had not paid over to or for the company. When asked the ground of his refusing to answer, he said that to do so would criminate himself. The case has been tried in the Rolls, and argued in this Court, in the shadow of this answer. Surely, without some explanation, it is a matter of certainty that what became of this money involves some criminality or misconduct by the managing director relating to his dealings with the War Office. This is the conclusion I

draw from the evidence, and therefore I am prepared to allow the appeal.

Appeal.
1914.

COCKBURN
v.
NEWBRIDGE SANITARY STEAM LAUNDRY CO., LTD.

MORIARTY L.J. concurred.

Solicitors for the appellant: *Fottrell & Son.*
Solicitor for the respondent Company: *C. P. Treacy.*
Solicitors for the respondent Llewellyn: *Thomas Gerrard & Co.*

R. ST. J. C.

McARDLE v. KANE.

(1914. No. 255.)

M. R.
1915.
April 27.

County Court—Jurisdiction—Suit for Specific Performance of Agreement to grant Right of Way—County Officers and Courts (Ireland) Act, 1877 (40 & 41 *Vict. c.* 56), *ss.* 33 (*d*), 36.

The jurisdiction conferred on the County Court by sect. 33 (*d*) of the County Officers and Courts (Ireland) Act, 1877, in suits for specific performance, includes a suit for the specific performance of an agreement in writing for good consideration to grant a right of way as appurtenant to a holding, and, accordingly, an action in the Chancery Division claiming such specific performance may, if otherwise within the County Court jurisdiction, be transferred to the County Court under sect. 36 of the County Officers and Courts (Ireland) Act, 1877.

R. v. *Westmoreland County Judge, Ingleton* v. *Maudsley*, 36 W. R. 477, distinguished.

MOTION.

The action was brought for the specific performance of an agreement in writing made on the 10th December, 1914, between the plaintiff and the defendant, whereby the defendant agreed to grant to the plaintiff, for the sum of £20, a pass of the uniform width of 10 feet through the lands of the defendant at Slieve, in County Louth, from the public road to the holding of the plaintiff at Shortstone, and for damages for the breach of the said agreement.

The agreement was as follows:—"I, Patrick Kane, of Slieve, in consideration of the sum of £20 which Peter M'Ardle, of Market Street, Dundalk, has agreed to pay me, hereby agree to

M R. 1915.

McArdle v. Kane.

grant to the said Peter M'Ardle a pass of the uniform width of 10 feet through my said lands at Slieve from the public road to the holding of the said Peter M'Ardle at Shortstone, subject to the consent of the Land Commission thereto, and I undertake to apply to the Land Commission in the prescribed form for their consent to my granting the said pass as aforesaid, said application to be made at the expense of the said Peter M'Ardle. And in the event of the Land Commission consenting to the said transfer I undertake to execute any document that may be necessary for the purpose of legally granting the said pass to the said Peter M'Ardle.

"Dated this 10th day of December, 1914.

"Patrick Kane.

"Witness—Patrick M'Court."

The poor law valuation of the lands over which the way was to be granted was £8 10s.

This motion was brought by the defendant to have the action transferred to the County Court of Louth, Division of Dundalk.

Cusack, for the defendant :—

A county court judge has jurisdiction to decree specific performance of an agreement to grant a right of way. *R.* v. *Westmoreland County Court Judge*, *Ingleton* v. *Maudsley* (1), where it was held that the county court had not such jurisdiction under sect. 9 of the County Courts Act, 1867 (corresponding to sect. 33 (*d*) of the County Officers and Courts (Ireland) Act, 1877), was a case of a mere licence not under seal. As to the rights of a licensee, see *Hurst* v. *Picture Theatres, Ltd.* (2).

Lardner, for the plaintiff, referred to *R.* v. *Westmoreland County Court Judge*, *Ingleton* v. *Maudsley* (1); Osborne, Jurisdiction and Practice of County Courts in Ireland in Equity (2nd ed.), p. 4.

(1) 36 W. R. 477. (2) [1915] 1 K. B. 1.

M. R.
1915.

McARDLE v. KANE.

O'CONNOR M.R. :—

I think that the county court has jurisdiction in this case. It is not governed by *R.* v. *Westmoreland County Court Judge* (1), which was a case of a mere licence by parol, while here there is an agreement in writing for good consideration to give a right of way as appurtenant to a holding. The costs of the motion will be costs in the matter.

Solicitor for the plaintiff: *Daniel O'Connell.*
Solicitor for the defendant: *Robert Dickie.*

A. H. W.

Barton J.
1914.
April 21.
May 13.

GRAY *v.* GRAY.

Will—Construction—Gift of Chattels Real—Gift over on Death without Heirs to person capable of being Heir—"Heirs" not read as "Heirs of the Body."

A testator left a chattel farm to his son John, and directed that if he should die "without lawful aires" the farm should go to testator's son Thomas or his "airs," he paying certain sums to John's widow and his brothers and sisters. John died without issue.

Held, that the context showed that the words "without lawful aires," meant without next-of-kin being children or descendants, and that the gift over to Thomas took effect.

Kirkpatrick v. *King*, 32 I. L. T. R. 41, distinguished.

ORIGINATING SUMMONS.

By his will, dated May 14th, 1892, John Gray, after certain other bequests, bequeathed to his son, John Alexander Gray, "all I possess of lands and chattels property by him paying the following demands," and he then directed certain payments to be made by John Alexander Gray to his mother (testator's widow) and to other children of the testator.

There then followed the following clause:—"And if John Alexander Gray dies without lawful aires [*sic*] the hoal [*sic*] farm

(1) 36 W. R. 477.

Barton J. 1914. GRAY v. GRAY.

and chattels will fall to Thomas Gray or his airs [*sic*] by him, Thomas, paying the following:—First, Lizzie Gray the sum of £50, and secondly, to his brothers and sisters the sum of £10 each." Thomas Gray was another son of the testator.

The testator, John Gray, died in 1897. He had several sons and daughters. At the date of his death testator was possessed of three farms of land held under statutory tenancies at judicial rents. His son, John Alexander Gray, died intestate and without issue in 1912. His widow, who was the plaintiff in this summons, took out administration to him. As her husband's administratrix, she claimed the farms held in 1897 under statutory tenancies which had been purchased by her husband, John Alexander Gray, under the Land Purchase Acts prior to his death in 1912.

John Alexander Gray had gone into possession of the lands comprising the three farms of his father in 1897 on his father's death, and remained in possession of same until his own death in 1912.

J. C. Davison for the executors of John Gray.

Cusack for the widow and administratrix of John Alexander Gray:—

John Alexander Gray was absolutely entitled to the farms of land, being chattels real, of which he entered into possession in 1897 on the death of his father, John Gray, in accordance with the gift in his will. *Kirkpatrick* v. *King* (1) is the same as the present case, and governs it. The word "heirs" cannot be read in the primary sense, but must be read "heirs of the body," and so an absolute interest in the statutory tenancies passed to John Alexander Gray, and the gift over to "Thomas Gray or his heirs" fails.

This case is indistinguishable from *Kirkpatrick* v. *King* (1). The language of the two wills is very similar. There is no distinguishing context in this will, and without such "heirs" must be read "heirs of the body."

(1) 32 I. L. T. R. 41.

Frederick Redmond for Thomas Gray :—

1. The intention of a testator is the dominating consideration in the construction of a will, and the clear intention of the will in this case was to keep the farms in testator's family.

2. The words used here would not necessarily have created an estate tail in realty, as the Courts are averse to the creation of such estates: *Bampfield* v. *Popham* (1); *Lethieullier* v. *Tracy* (2); *Houston* v. *Platt* (3).

3. The rule relied on by the other side is one of construction and not of law, and such rules are frequently relaxed if the context permits it: *Byng* v. *Byng* (4); *Grieve* v. *Grieve* (5). Such rules of construction were never strictly enforced in relation to personalty, and there is a growing tendency to mitigate them: *Bedson's Trusts* (6); *Slattery* v. *Ball* (7); Jarman on Wills (6th ed., p. 1959).

4. The rule that a devise to *A* for life or to *A simpliciter*, and, if he dies without issue, to *B*, creates an estate tail in *A*, has been greatly relaxed: *Knight* v. *Ellis* (8); *Sheridan* v. *O'Reilly* (9); *Longworth* v. *Campbell* (10).

Cusack in reply.

BARTON J. :—

The testator, John Gray, was, at the date of his death in 1897, possessed of a chattel farm. He left several sons and daughters, including a son, John Alexander Gray, and a son, Thomas Gray.

By his will, dated in 1892, he bequeathed to his son, John Alexander Gray, "all I possess of lands and chattels property by him paying the following demands." He then directs certain payments to be made by John Alexander Gray to the testator's widow, and to some of testator's other children.

(1) 2 Vern. 451.
(2) 3 Atk. 797.
(3) 7 L. J. (O. S.) 450.
(4) 10 H. L. Cas. 171.
(5) L. R. 4 Eq. 180.
(6) 28 Ch. D. 525.
(7) 40 Ch. D. 11.
(8) 2 Br. Ch. Cas. 570.
(9) [1900] 1 Ir. R. 380.
(10) [1910] 1 Ir. 23.

Barton, J.
1914.
GRAY
v.
GRAY.

Then comes the clause with which this summons is concerned. It runs as follows:—"And if John Alexander Gray dies without lawful aires the hoal farm and chattels will fall to Thomas Gray, or his airs by him Thomas paying the following:—First, Rachel Lizzie Gray the sum of £50, and, secondly, to his brothers and sisters the sum of £10 each."

It is to be observed that the gift over in the event of John Alexander Gray dying "without lawful aires" benefits all the persons who could be John Alexander Gray's collateral heirs or next-of-kin, so that it is reasonably clear that the words "lawful aires," if they do not mean "heirs of the body," must refer to children or descendants, and not to any remoter heirs or next-of-kin.

John Alexander Gray went into possession of the lands under the bequest to him, and remained in possession until his death in 1912. He died intestate and without having had any issue, and his widow, Rachel Lizzie Gray, is his administratrix, and is the plaintiff in this summons. The defendant is the surviving executor of the testator. Thomas Gray, who is named in the gift over to "Thomas Gray or his airs" is alive, and is resident in the United States of America.

The question turns upon the meaning of the words "if John Alexander Gray dies without lawful aires." It was contended by Mr. Cusack, upon behalf of the plaintiff, that "lawful aires" must be construed "heirs of the body." He relied upon *Kirkpatrick* v. *King* (1), where there was a bequest of chattel lands to two nephews, and "if they die without heirs" to another nephew and his son. It was held in that case that the word "heirs" would in a devise of real estate have been read "heirs of the body," and that, as the language of the will would have created an estate tail in real estate, it gave an absolute interest in the chattel lands to the two nephews, and the gift over failed.

It has been contended by Mr. Redmond, on behalf of Thomas Gray, that a more limited meaning should be given to the words "lawful aires," having regard to the context of this will; that the words "dies without lawful aires" mean dies without leaving

(1) 32 I. L. T. R. 41.

children or descendants; and that as John Alexander Gray never had any children, the gift over to "Thomas Gray or his airs" takes effect.

It is to be observed that, in the passage in question, *heirs* is spelt "aires" in one place and "airs" in another place. The word "whole" is spelt "hoal." The testator was uneducated, ignorant of law, and *inops consilii*. Nevertheless, his will must be construed in accordance with the rule that a word of a technical or legal character is to be construed prima facie in accordance with its technical or legal meaning.

I agree with Mr. Cusack that, in the absence of a distinguishing context, this case would be governed by *Kirkpatrick* v. *King* (1). But the question is whether there is not a context which distinguishes this case, and enables the Court to ascertain satisfactorily from the will itself what the testator meant by the words "dies without lawful aires." In the light of a sufficient context the word "heirs" has received from time to time several different constructions, when used in connexion with gifts of personalty, e.g., "statutory next-of-kin," "children," "issue." The words "heirs of the body" have been construed "children" in a gift of personalty, where the context justified it: *Symers* v. *Jobson* (2).

The occurrence of the word "heirs" twice in the same sentence may help us to arrive at its meaning in the testator's dictionary. The gift over is to "Thomas Gray or his airs," and, according to an ordinary canon of construction, "heirs," in a gift of personalty to "A or his heirs," is to be construed as a substitutional word, and as meaning "statutory next-of-kin": *Finlason* v. *Tatlock* (3). Why should not the words "lawful aires," occurring as they do in the same sentence, be construed as referring to persons appointed by law to succeed to personal property? If so, they cannot refer to persons who might be John Alexander Gray's collateral next-of-kin, because all such persons are expressly benefited by the gift over, but only to next-of-kin being children or descendants living at his death. Any construction of this bequest must be an artificial one; but this view seems to me to accord better with

(1) 32 I. L. T. R. 41.
(2) 16 Sim. 267.
(3) L. R. 9 Eq. 258.

Barton J. 1914. GRAY v. GRAY.

the context, and with the testator's expressed intention, than to hold that "lawful aires," in this unlettered will, means "heirs of the body," and that John Alexander Gray took an absolute estate. In my opinion the gift over takes effect, and Thomas Gray is now entitled to these chattels real.

Solicitors for the executor of testator: *Peel & Son.*

Solicitors for the administratrix of John Alexander Gray: *Best & Best.*

Solicitors for Thomas Gray: *Fisher & Fisher.*

R. W. L.

Barton J. 1915. Jan. 21, 28.

GREENWOOD *v.* LUTMAN.

Power — Construction — Jointure — Voluntary Conveyance — Ex post facto *consideration.*

Prima facie, a jointure is an estate to the wife for life to take effect on the death of the husband: *De Hoghton* v. *De Hoghton*, [1896] 2 Ch. 385, followed.

L., being seised in fee of lands, by a voluntary settlement executed in May, 1879, granted the lands to trustees to the use of L. for life, with remainder to the use of trustees of a term of 500 years, upon trusts for raising portions for the younger children of the settlor, and, subject thereto, to the use of the first and other sons of L. successively in tail, with remainder to his first and other daughters in tail, with remainders over. The deed contained a power to L. to appoint to any woman he might marry for her life, or any less period, a rentcharge by way of jointure not exceeding £150 a year, charged upon all or any of the premises.

By a subsequent deed, executed in August, 1879, and made in consideration of a marriage afterwards solemnized, after reciting the deed of May and the powers of jointuring therein contained, and reciting also an antenuptial agreement to create a rentcharge of £150 from and after the solemnization of the marriage by way of jointure during the life of the intended wife, and for that purpose to exercise the power of jointuring in the deed mentioned, L., in pursuance of the agreement, and in consideration of the intended marriage, and in exercise of the aforesaid power and of every or any other power in anywise him enabling, appointed to the intended wife and her assigns, during her life, a yearly rentcharge of £150 in full for her jointure, to be charged upon the hereditaments comprised in the deed of May, 1879, payable in quarterly payments, the first payment to be made three months after the date of the solemnization of the intended marriage.

Held, that the power contained in the settlement of May, 1879, did not authorize an appointment of a rentcharge to a wife to take effect in the lifetime of L.

Held, also, that the settlement of May, 1879, was not, on the ground of being voluntary, void as against the settlement of August, so as to give effect to the rentcharge purported to be created by the latter settlement to commence from marriage, inasmuch as the marriage created an *ex post facto* consideration for the deed of May, and the children of the marriage were within such consideration.

ORIGINATING SUMMONS.

This was a summons taken out by Richard Hargraves Greenwood and William Isaac Barrett, trustees for the purposes of the Settled Land Acts of an indenture dated the 15th May, 1879, for the determination of the following questions:—

1. Whether on the true construction of the power reserved to Henry E. J. Lutman by the indenture of the 15th May, 1879, to charge the hereditaments therein comprised with a rentcharge by way of jointure in favour of any woman whom he might marry, he was thereby expressed to be empowered to charge the hereditaments with an annuity or rentcharge in favour of Eleanor Margaret Lutman commencing in the lifetime of Henry E. J. Lutman so as to make the gales thereof accruing during the joint lives of Henry E. J. Lutman and his wife a charge on the hereditaments as against the persons entitled in remainder after the determination of the life estate of Henry E. J. Lutman?

2. If the answer to question 1 were in the negative, was the power effectually exercised by an indenture of the 15th August, 1879, so as to charge the hereditaments from and after the death of Henry E. J. Lutman, as against the persons entitled in remainder, with a jointure in favour of Eleanor Margaret Lutman in the event of her surviving Henry E. J. Lutman?

3. Whether the arrears now due to Eleanor Margaret Lutman in respect of the annuity or rentcharge created or purported to be created by an indenture of the 15th August, 1879, are properly payable out of the capital money in the hands of the plaintiffs representing proceeds of the sale of lands comprised in the said indentures?

By the indenture of the 15th May, 1879, after reciting that Henry E. J. Lutman was seised in fee of the premises intended to be thereby granted, the said Henry E. J. Lutman granted to

Barton J. 1915. GREENWOOD v. LUTMAN.

John Henry Lutman and Charles A. Lutman and their heirs certain lands called the Bansha estate, in the county of Tipperary, to hold to the use of trustees for a term of 99 years upon trust to raise the annual sum of £25 for Andrew E. Lutman (brother of Henry E. J. Lutman) and a like sum for each of his six sisters until they should marry, and subject thereto to the use of Henry E. J. Lutman for life, with the remainder to the use of trustees for a term of 500 years from the death of Henry E. J. Lutman for the purpose of raising a sum of £1000 as portions for the younger children of Henry E. J. Lutman, and subject thereto to the use of the first and other sons of Henry E. J. Lutman successively in tail, with remainder to his first and other daughters in tail, with remainders over. The said indenture contained a power to each of them, the said Henry E. J. Lutman and A. E. Lutman, to appoint to any woman he might marry, for her life or any less period, a rentcharge by way of jointure, not exceeding in the whole for such woman the sum of £150, charged upon all or any of the premises, and to create a term for the better securing of same.

By the indenture of the 15th August, 1879, made between Henry E. J. Lutman of the first part, Eleanor Margaret Bywater of the second part, and Richard Keysell and Richard Hargraves Greenwood of the third part, being a settlement made in contemplation of the marriage afterwards solemnized between Henry E. J. Lutman and Eleanor Margaret Bywater, after reciting the settlement of the 15th May, 1879, and the power of jointuring therein contained and reciting also an antenuptial agreement to create a rentcharge of £150 from and after the solemnization of the marriage by way of jointure during the life of the intended wife, and for that purpose to exercise the power of jointuring in the deed of May mentioned, Henry E. J. Lutman, in pursuance of the agreement in that behalf, and in consideration of the said intended marriage, and in exercise of the power for that purpose in the deed of May mentioned, and of every or any other power in anywise him enabling, limited and appointed unto and to the use of Eleanor Margaret Bywater and her assigns during her life (in case the intended marriage should take place) one yearly rentcharge of £150 in full for her jointure and in bar of all dower and free-

bench, to be charged upon and issuing out of the hereditaments comprised in the indenture of the 15th May, 1879, payable by equal quarterly payments, the first payment to be made at the end of three calendar months next after the date of the solemnization of the intended marriage, and Henry E. J. Lutman appointed the said hereditaments to Richard Keysell and Richard Hargraves Greenwood for the term of 300 years, to commence from the solemnization of the intended marriage, for further securing payment of the rentcharge. The indenture contained a covenant on the part of Henry E. J. Lutman for further assurance.

The intended marriage was duly solemnized on the 13th February, 1880, and there was issue of the marriage two children, namely, Robert Bywater Lutman and Muriel Lutman, both of whom had since attained the age of twenty-one years, and they and Henry E. J. Lutman were still living.

In 1894, Richard Hargraves Greenwood was appointed a trustee of the indenture of the 15th May, 1879, in the place of Charles A. Lutman, jointly with John H. Lutman, and later in the same year William J. Barratt was appointed a trustee in the place of John H. Lutman, who had died.

The Bansha estate was sold to the occupying tenants through the Irish Land Commission by Henry E. J. Lutman as tenant for life, and a sum of £4822 19*s.*, respresenting the residue of the purchase money of the estate, was paid to William J. Barratt and Richard H. Greenwood as trustees of the deed of the 15th May, 1879.

All the annuities mentioned in the deed of the 15th May, 1879, save one of £25 a year, payable to Florence A. Lutman, which had been paid up to November, 1913, had ceased to be payable owing to the deaths or marriages of the parties entitled.

The jointure of £150 a year payable to Eleanor Margaret Lutman under the settlement of the 15th August, 1879, fell into arrear, and there was now due on foot of same the sum of £3367 19*s.* 7*d.*, which sum Eleanor Margaret Lutman claimed should now be paid out of the above capital sum of £4822 19*s.*

Barry Meade for the plaintiffs.

Jellett K.C., for Eleanor Margaret Lutman :—

The appointment of a rentcharge, even by way of jointure,

Barton J.
1915.
GREENWOOD v. LUTMAN.

to the wife for life, may take effect in the lifetime of the husband: *Jamieson* v. *Trevelyan* (1). *De Hoghton* v. *De Hoghton* (2) is distinguishable, as the context in the will showed that the intention of the testator was to enable the husband to make provision for his widow and children after his death.

The deed of the 15th May, 1879, was a voluntary conveyance, and in so far as it conflicts with the deed of the 15th August, 1879, is void: May on Voluntary Conveyances, pp. 5, 153; *Trowell* v. *Shenton* (3); *Dolphin* v. *Aylward* (4). The jointure limited in the deed of the 15th August was plainly for the life of the jointress.

John Leech K.C., for Henry E. J. Lutman and Robert Bywater Lutman:—

I. Prima facie, jointure is a provision for the wife after the death of the husband: Stroud's Judicial Dictionary. In *Jamieson* v. *Trevelyan* (1), the power was merely to substitute a life annuity for an existing life annuity: Sugden on Powers, p. 484. In *De Hoghton* v. *De Hoghton* (2), the word "jointure" was not inserted in the power, yet it was held that the power did not authorize an appointment to take effect in the lifetime of the husband. Here the word "jointure" is used. "For her life" means for the residue of her life from the time when the annuity begins.

II. The first deed was not a voluntary deed. Even if voluntary, there was an *ex post facto* consideration. Marriage will supply an *ex post facto* consideration for a voluntary settlement: *Guardian Assurance Company* v. *Avonmore* (5). Even if the first deed was voluntary, the deed of August operated no further than to execute the power contained in the voluntary deed, which was a power of jointure and nothing more. "In exercise of any other power him enabling" are mere general words. Where a particular power is expressly recited the use of general words will not bring in other powers: *In re Porter's Settlement* (6). The words "limit and appoint" are not appropriate to a conveyance,

(1) 10 Ex. 269.
(2) [1896] 2 Ch. 385.
(3) 8 Ch. D. 318.
(4) L. R. 4 H. L. 486.
(5) I. R. 6 Eq. 391.
(6) 45 Ch. D. 179.

but only to the exercise of a power. The rentcharge would be fed out of the donor's life estate, and the jointure out of the power. As to payment of arrears of a jointure rentcharge, see *In re The Duke of Manchester's Settlement* (1).

Jellett K.C. in reply :—

If you use the consideration in the second deed for the purpose of setting up the first deed, you cannot use it also to upset the second deed. If you find a proper source enabling the appointment, you will attribute the execution of the power to that proper source.

Cur. adv. vult.

Jan. 28.

BARTON J. :—

H. E. J. Lutman, being seised in fee of the hereditaments in question, settled them by a deed dated the 15th May, 1879. The settlement appears to have been a voluntary one. By this deed he granted the hereditaments to trustees to hold to the use of the trustees for a term of 99 years upon trust to raise annuities for his six sisters as therein provided, and subject thereto to the use of the said H. E. J. Lutman for life, with remainder to the use of trustees of a term of 500 years from the death of the said H. E. J. Lutman upon trusts for raising portions for the younger children of the said H. E. J. Lutman, and subject thereto to the use of the first and other sons of the said H. E. J. Lutman successively in tail, with remainders over. The deed contained a power to H. E. J. Lutman to appoint to any woman whom he might marry, for her life or any less period, a rent-charge by way of jointure not exceeding £150 a year, charged upon all or any of said premises, and to create a term for the better securing of the same.

The first question which has been discussed has been the construction of that power, with reference to which Mr. Jellett contended that it enabled H. E. J. Lutman to charge the inheritance, in favour of his wife, with a rent-charge during his own life. He relied upon certain passages in the judgments of Alderson B., and Platt B., in *Jamieson* v. *Trevelyan* (2). But these dicta were

(1) [1910] 1 Ch. 106. (2) 10 Ex. 269.

Barton J. 1915. GREENWOOD v. LUTMAN.

unnecessary for that decision, and have never passed into our law. In Sugden on Powers, at p. 484, the learned author states that the death of the husband is the period at which a jointure should arise, and he treats *Jamieson* v. *Trevelyan* (1) as a decision which depended upon the peculiar language of a particular will. The same view was adopted by Stirling J. in his carefully considered judgment in *De Hoghton* v. *De Hoghton* (2). He says: "It evidently was the opinion of Lord St. Leonards that prima facie a jointure meant a provision to commence at the death of the husband. I think that is the prima facie meaning of the word; and the question is whether there is anything in this will to give it another meaning. I think not. It seems to me that the context is against any such notion." It is to be observed that in the present case the context is rather stronger than in *De Hoghton* v. *De Hoghton* (2). The annuity is stated to be "by way of jointure," while in *De Hoghton* v. *De Hoghton* (2) there was no direct statement of that kind, but merely a reference in the instrument to the power as "the said power of jointuring."

Accordingly, I am of opinion that the power in the deed of May, 1879, enabled the settlor to create a rentcharge to arise after his death, and did not enable him to charge the hereditaments with a rentcharge during his life.

In the next place, Mr. Jellett contended that the deed of May, 1879, being a voluntary conveyance, and the deed of August, 1879, being for valuable consideration, and having been executed before the passing of the Voluntary Conveyances Act, 1893, the former deed must be regarded as fraudulent and void, and the latter deed, in which H. E. J. Lutman purported to create a rentcharge to commence from the date of the marriage, takes effect.

I do not agree with that contention. The deed of May, 1879, may have been voluntary at the date of its execution; but the marriage which was afterwards entered into on the strength of the power contained in that deed, created an *ex post facto* consideration. The children of the marriage were within the marriage consideration, and are not to be regarded as volunteers, but as purchasers for value.

(1) 10 Ex. 269. (2) [1896] 2 Ch. 385, 395.

I am not asked to decide whether the words "and of every or any other power in anywise enabling the said H. E. J. Lutman," coupled with the covenant for further assurance contained in the deed, have the effect of binding H. E. J. Lutman's life interest under the settlement. The question which I have to decide is whether he had any power to create a rentcharge that would bind the inheritance in his lifetime. In my opinion, he had no such power. It follows that the defendant Mrs. Eleanor Margaret Lutman is not entitled to be paid these arrears out of the purchase-money.

Solicitors for all the parties: *Anderson & Bland.*

D. M. S.

ALEXANDER *v.* CURRAGH AND OTHERS.

Practice—Costs—Taxation—Interlocutory Order directing Payment of Costs—Interest as from date of Order—Rules of Supreme Court, Ireland, 1905, *Order XLII, Rule* 15.

An interlocutory order directing the payment of costs by one person to another carries interest on the costs thereby awarded, as from the date of such order.

Taylor v. *Roe,* [1894] 1 Ch. 413, followed and applied.

SUMMONS by the plaintiff for payment out of the funds in Court of the amount found due to him, and costs.

The funds in Court represented the proceeds of the sale of the property of the defendants which had been sold in the action, which was brought to enforce payment of the defendants' contribution to renewal fines paid by the plaintiff for the benefit of the common property of the plaintiff and the defendants.

By an attachment order, dated the 28th February, 1911, the defendant William J. Curragh was directed to pay to the plaintiff his costs of the motion and order. These costs amounted to £17 13*s.* 11*d.*, and the plaintiff now claimed interest on the said amount from the date of the order.

By a further attachment order, dated the 5th February, 1912, the defendant William J. Curragh was directed to pay to the plaintiff his costs of the motion and order. These costs amounted

Barton J. 1915.

ALEXANDER v. CURRAGH.

to £17 3*s.* 7*d.*, and the plaintiff now claimed interest on the said amount from the date of the order.

The payment schedule comprised interest computed on the above two sums as from the dates of the orders, to be paid by the defendant William J. Curragh out of his share of the residue of the funds. To this the defendant objected, upon the ground that interest was only chargeable from the date of the certificate of taxation of the costs.

Charles Murphy, for the plaintiff:—

Interest on costs is now payable from the date of a judgment or order which directs payment by one person to another. The right to interest on judgments was first given by 3 & 4 Vict. c. 105, sects. 26 and 27. It was held in *Lidwell* v. *Lidwell* (1), that interest on costs ran only from the date of taxation, but the decision in that case turned on the forms of Chancery writs of execution then in use. Judgments in the Common Law Courts carried interest from the date of the judgment, up to the passing of the Judicature Act, when the form of writ of fi. fa. then adopted followed the old Chancery form, and only allowed interest on costs from the date of taxation: *Shroeder* v. *Clough* (2); but the Judicature rules of 1883 in England, and the forms thereby prescribed, which are identical with the present Irish rules and forms (see Order XLII, Rule 15; Appendix H, forms 1 and 2), do not contain any restriction as to the date from which interest is to run. In *Taylor* v. *Roe* (3) it was held that where an interlocutory order had been made directing the payment of costs by one person to another, it carried interest on the costs from the date of the order. As the rules and forms are identical, the English practice ought to be followed. [He also referred to *Boswell* v. *Coates* (4), and to the Judicature Act (Ireland) 1877, sect. 61.]

G. Howe, solicitor, for the defendant William J. Curragh:—

Until taxed, this demand was not a liquidated demand. Execution could not issue on these costs until they were taxed.

(1) 7 I. E. R. 91.
(2) 46 L. J. C. P. 365; 35 L. T. 85.
(3) [1894] 1 Ch. 413.
(4) 57 L. T. 742, 57 L. J. Ch. 101.

The plaintiff should have taxed the amount of these costs and demanded payment at once instead of waiting for the taxation of the general costs of the action.

C. Murphy, in reply:—

The defendant has not suffered by the delay of taxation. If the defendant's contention is correct, he would have been compelled to pay the costs of taxation of three bills instead of one.

BARTON J.:—

Lidwell v. *Lidwell* (1) no longer regulates the practice in Ireland, which now depends upon Order XLII, Rules 13 and 15. The corresponding English Order XLII, Rules 14 and 16, was considered in *Taylor* v. *Roe* (2), where it was held by Stirling J. that an interlocutory order directing the payment of costs by one person to another carries interest from the date of the order. There is no distinction between that case and the present one, and there is no reason why the practice should not be the same in the two countries, nor why the decision of Stirling J. should not be followed and applied here. In my opinion the plaintiff is entitled to interest upon these two sums of costs from the dates of the two orders respectively.

Solicitor for the plaintiff: *A. W. Glover.*

Solicitors for the defendant William J. Curragh: *H. Wallace & Co.*

D. M. S.

(1) 7 I. E. R. 91. (2) [1894] 1 Ch. 413.

Barton J.
1914.
June 23.

GREGG & CO. *v.* JAMES BOYD AND OTHERS.

Judgment Mortgage—Affidavit of Ownership—Statement of Barony—Barony divided into two parts under County Treasurers (Ireland) Act, 1823 (4 *Geo.* 4, *c.* 33), *s.* 17—*Judgment Mortgage (Ireland) Act*, 1850 (13 & 14 *Vict. c.* 29), *s.* 6.

An affidavit for the purpose of registration of a judgment under the provisions of the Judgment Mortgage Act, 1850 (13 & 14 Vict. c. 29), stated that the lands of the debtor were situated in the barony of Upper Iveagh, and county of Down. The barony of Upper Iveagh had been divided into two parts by the grand jury of the county at the Spring Assizes of 1824, in accordance with the powers conferred on them by section 17 of the County Treasurers (Ireland) Act of 1823. These two parts or divisions were known as Upper Iveagh, Upper Half, and Upper Iveagh, Lower Half.

Held, that the division of the barony of Upper Iveagh into two parts did not constitute these parts distinct baronies, and that, therefore, the lands of the debtor were properly described in the judgment creditors' affidavit as situate in the barony of Upper Iveagh.

TRIAL OF ACTION.

The plaintiffs, by their statement of claim, asked for a declaration that the sum of £179 7*s.* 3*d.*, with interest and costs, was well charged upon the interest of the defendant James Boyd in the lands of Moneynabane, in the parish of Dromara, barony of Upper Iveagh, and county of Down.

By her defence, the defendant Sarah Boyd (trustee for her husband, the defendant James Boyd) pleaded, *inter alia* :—

1. When registering the said judgment in the Registry of Deeds as a mortgage, the plaintiffs did not comply with the provisions of the 6th section of the Judgment Mortgage Act, 1850 (13 & 14 Vict. c. 29).

2. The affidavit to register said judgment as a mortgage does not contain an accurate description of the lands sought to be affected, in that the barony in which said lands are situated is wrongly stated to be the barony of Upper Iveagh, and at the hearing of this case the defendant, Sarah Boyd, will contend that the said registration is therefore null and void.

The following facts were proved or admitted at the trial:—

The plaintiffs, on the 15th November, 1912, obtained and entered up a judgment in the King's Bench Division of the High Court of Justice in Ireland against the defendant, James Boyd, for the sum of £173 11*s.* 3*d.*, besides the sum of £5 16*s.* 0*d.* for costs, and on the 23rd November following the plaintiffs filed in the King's Bench Division an affidavit which contained the following statement:—"I further say that, to the best of my knowledge and belief, the said James Boyd is, at the time of swearing this affidavit, seised or possessed of, at law or in equity, or has disposing power which he may without the assent of any other person exercise for his own benefit over, certain lands, tenements, hereditaments, and premises hereinafter mentioned that is to say, portions of the townland of Moneynabane, in the parish of Dromara, barony of Upper Iveagh, and county of Down, containing 23 acres or thereabouts, statute measure."

At the Spring Assizes of 1824 the Grand Jury of the county of Down had, in accordance with the provisions of the County Treasurers (Ireland) Act, 1823 (4 Geo. 4, c. 33, s. 17), divided the barony of Upper Iveagh, in the county of Down, into two parts, known as Upper Iveagh, Upper Half, and Upper Iveagh, Lower Half.

R. F. Harrison K.C. and *Charles Murphy*, for the plaintiffs:—

This affidavit, for the purpose of registering the judgment as a mortgage, is in conformity with the requirements of sect. 6 of the Judgment Mortgage Act, 1850 (13 & 14 Vict. c. 29). The barony is rightly stated. So far as the question of the *barony* is concerned, we submit that the only baronies in the county of Down coming under the denomination of Iveagh in any shape or form are the baronies of Upper Iveagh and Lower Iveagh. These two baronies are the only ones set out in the schedule to the Polling Places Act of 1850 (13 & 14 Vict. c. 68). For the purposes of county cess there were two divisions of Upper Iveagh, and the county cess was collected in moieties, but in law these two divisions formed only one barony. It does not in the least matter whether there were two for fiscal purposes or not after 1850.

Barton J.
1914.

GREGG
v.
BOYD.

The Ordnance Survey Map of 1835 refers to Upper Iveagh and Lower Iveagh only. In Lewis's Topographical Dictionary there is no notice taken of any division in the barony of Upper Iveagh. See also page 322 of the Census Commissioners' Reports of 1843.

Upper Iveagh was divided by the Grand Jury of Down in 1824 in accordance with the provisions of the County Treasurers (Ireland) Act, 1823 (4 Geo. 4, c. 33), which by section 17 provides that it shall be lawful for the grand juries "when the number of acres in any barony shall exceed fifty thousand, to divide any such barony into two parts, and to appoint two high constables or collectors for levying the grand jury cess." The object of the Act was not to create two baronies, but merely for purposes of collection—for fiscal or financial purposes connected with the administration of the Act—to divide the barony into two parts, each of which must have one uniform county cess. Had the division been made under the Grand Jury Act of 1836, the case of the other side might be stronger, because section 175 of that Act provides that a grand jury may by presentment divide any barony or half barony into sub-divisions, provided such baronies shall consist of forty-five thousand acres.

In *Harris* v. *O'Loghlen* (1) there was an affidavit for registration of a judgment which stated that the lands of the debtor were situated in the barony of Bunratty, in the county of Clare, and there was no barony of Bunratty *per se*, but two distinct and different baronies of Upper and Lower Bunratty. Sir E. Sullivan M.R., in his judgment says:—"The affidavit states that the lands are situate in the barony of Bunratty; there is no such barony"; and he held that the lands of the debtor were not charged by the judgment so registered. To the same effect is *Earl of Limerick, Owner*; *Turner, Petitioner* (2). In this case we submit that there is a barony of Upper Iveagh simply, and that there are not two distinct baronies as in *Harris* v. *O'Loghlen* (1). That case merely shows that if we had registered against lands in the barony of Iveagh the registration would have been bad, because there is no barony of Iveagh, but baronies of Upper Iveagh

(1) I. R. 5 Eq. 514.

(2) 7 Ir. Jur. (N. S.) 65.

and Lower Iveagh. The defendants, to support their contention, must show that in upper half and lower half of Upper Iveagh different county cess could be levied, and that the divisions were not merely collecting areas.

[They also referred to the 7th schedule to the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 53); the Grand Jury Act of 1856 (19 & 20 Vict. c. 63), s. 8; *In re Ryan* (1).]

S. C. Porter, for the defendant Sarah Boyd:—

The affidavit is defective. It misstates the barony in which the lands sought to be charged are situate. We rely on *Harris* v. *O'Loghlen* (2). In that case there was no barony of Bunratty. Here there is no barony of Upper Iveagh. In reality there are two baronies, Upper Iveagh, Lower Half, and Upper Iveagh, Upper Half. The grand jury divided the old barony of Upper Iveagh in 1824 into half-baronies, for fiscal purposes of course, but baronies and half-baronies did not exist for any other purposes. The Grand Jury Act, 1836 (6 & 7 Wm. 4, c. 116), in sect. 3, provides that every half-barony so created "shall be considered and deemed a barony." See also sect. 175 of the same Act, under which the grand jury of any county are given power "to divide any barony or half-barony thereof for the purposes of this Act, and for all purposes relating to the presenting, raising, and levying of money."

In sect. 6 of the Act of 1850 (13 & 14 Vict. c. 29) the word "barony" must, we submit, be defined by reference to the Grand Jury Acts.

The two half-baronies created in 1824 have been treated as baronies in the Topographical Index of Census Reports, 1861, and in all the succeeding Census Reports, and also in the seventh schedule to the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), which specified Upper Iveagh, Upper Half, as a barony, and Upper Iveagh, Lower Half, as a separate and distinct barony.

(1) 3 Ir. Ch. Rep. 33. (2) I. R. 5 Eq. 514.

Barton J.
1914.
GREGG
v.
BOYD.

The Court takes judicial notice of territorial divisions: Phipson on Evidence (5th ed.), p. 13; Taylor on Evidence (1895 ed.), p. 17.

McGonigal K.C., and *J. Robb*, for the assignees in bankruptcy of James Boyd.

BARTON J.:—

The question for decision is whether this judgment was well registered. The 6th section of the Judgment Mortgage Act requires the judgment creditor to state in his affidavit the county and barony in which the lands are situate. In the present case the affidavit states that the lands are situate in the barony of Upper Iveagh. It is objected that there is no such barony, because the grand jury at the Spring Assizes of 1824 divided the barony of Upper Iveagh into two parts, known as Upper Iveagh, Upper Half, and Upper Iveagh, Lower Half. The defendant submits that since 1824 the two parts have constituted separate baronies, taking the place of the former barony of Upper Iveagh. The division was effected under sect. 17 of the County Treasurers (Ireland) Act, 1823 (4 Geo. 4, c. 33), s. 17, which "for the greater security of the public money raised under the authority of grand juries and the greater facility of collecting the same" enabled grand juries, when the number of acres in any barony should exceed 50,000, "to divide such barony into two parts and to appoint two high constables or collectors for raising and levying the grand jury cess." The section seems to contemplate the division of a barony into component parts for certain purposes, not the creation of two new baronies, or of two new "half-baronies" within the meaning which was afterwards attached to the word "half-barony" in the Grand Jury Act of 1836. This view is confirmed by the form in which, after the passing of the latter Act, the baronies of County Down were enumerated in a subsequent statute. In the year 1850, long after the passing of the Grand Jury Act, and barely a month after the passing of the Judgment Mortgage Act, an Act was passed which gave in a schedule what purported to be a complete list of all the baronies

of all the counties in Ireland, namely, the Polling Places Act (13 & 14 Vict. c. 68). In the schedule to that Act the barony of Upper Iveagh appears as a single barony, and there is no allusion to the upper and lower halves into which it had been divided in 1824 for the purpose of the Act of 1823.

In *Harris* v. *O'Loghlen* (1) Sir E. Sullivan M.R. had to decide a similar question with reference to the registration of a judgment against lands in the County Clare. He treated the schedule to the Polling Places Act, 1850, as a contemporaneous statutory catalogue of the baronies in Ireland, and held himself bound to take judicial notice that the baronies which are contained in that schedule were the only ones existing at that date, *i.e.* 1850. Nothing has happened since 1850 to alter the state of affairs so far as the barony of Upper Iveagh is concerned.

Census reports, and topographical books, have been referred to on both sides, but I have not derived much assistance from them. Mr. Porter referred to the schedule to the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), which seems to recognize the two parts of Upper Iveagh as separate baronies. But that schedule makes use of parishes, townlands, and other areas for the purpose of redistribution of seats; and I cannot regard it as having the same significance as the schedule to the Polling Places Act, 1850, which was judicially recognized in *Harris* v. *O'Loghlen* (1) as a contemporaneous enumeration of baronies, to which resort may be had for the purposes of sect. 6 of the Judgment Mortgage Act.

In my opinion this judgment was duly registered, and is well charged upon the defendant's lands in the barony of Upper Iveagh and County of Down.

Solicitor for the plaintiff: *William Alexander.*

Solicitor for the defendant James Boyd: *J. K. Gordon.*

Solicitor for the assignees in bankruptcy of James Boyd: *James Alexander.*

R. W. L.

(1) I. R. 5 Eq. 514.

Barton J.
1915.
June 15.

McCARTEN, Deceased.

McKENNA *v.* McCARTEN.

Will—Construction—Absolute Gift—Restriction—Legatee to receive a Sum monthly with Power to dispose by Will of any Portion remaining.

A testatrix by her will provided as follows:—"I will and bequeath to my brother J. my household furniture and the money in bank which I am entitled to under the will of my brother T., to be given to him at the rate of £2 per month during his life, and should any portion be remaining at his death he to have power to dispose of it by will." There was no gift over.

Held, that J. took an absolute interest, and was entitled to payment of a sum in bank of £317, which represented assets of the testatrix received by her under the will of her brother T.

Originating Summons.

Mary Jane McCarten, by her will, after other dispositions, provided as follows:—"I will and bequeath to my brother John McCarten my household furniture and the money in bank which I am entitled to under the will of my brother Thomas McCarten to be given to him at the rate of £2 per month during his life and should any portion be remaining at his death he to have power to dispose of it by will."

The testatrix died at Armagh on the 12th March, 1913, and probate of her will was granted to the plaintiffs (her executors) on the 9th August of the same year. From the death of the deceased the defendant, John McCarten, was paid £2 monthly out of a sum of £349 16*s.* 8*d.* in the Hibernian Bank, representing money to which the testatrix had become entitled under the will of her brother Thomas. Of this sum of £349 16*s.* 8*d.* there remained, in April, 1915, in the Hibernian Bank to the credit of the plaintiffs, as executors of Mary McCarten, a sum of £317 16*s.* 1*d.*, and the defendant, John McCarten, demanded payment of the entire sum to him, claiming that, according to the true construction of the will of the deceased, he was entitled to receive the same.

On the 26th April, 1915, the executors issued a summons for the direction of the judge as to whether the defendant was entitled to payment forthwith of the entire sum of £317 16*s.* 1*d.*

Lardner, for the executors.

Malone, for the defendant:—

John McCarten takes an unfettered interest in the money in bank. There is an absolute interest bequeathed to him by the will of testatrix: *In re Parker* (1), *per* Jessell M.R., at p. 46; *In re Williams* (2).

F. Redmond, for the next-of-kin of testatrix other than the defendant:—

On the words of the will the gift is not absolutely vested in John McCarten. The gift is at first absolute, but the language used clearly shows that the legatee was only intended to take a restricted gift. That is the purport of the will: Theobald on Wills, p. 485; *Lassence* v. *Tierney* (3); *Harris* v. *Newton* (4); *Scawin* v. *Watson* (5). *Gompertz* v. *Gompertz* (6) is an illustration of what amounts to a diminution or qualification of a first absolute gift, and applies to the present case. See also *In re Richards* (7).

BARTON J.:—

It has been argued by Mr. Redmond, who put forward everything that could be said on the subject, that John McCarten took no more than a life interest in the money in bank, with a testamentary power of appointment.

It is material to consider, in a case of this kind, whether the bequest was absolute in the first instance. The words of bequest are: "I will and bequeath to my brother John McCarten my household furniture and the money in bank which I am entitled

(1) 16 Ch. D. 44.
(2) [1907] 1 Ch. 180.
(3) 1 Mac & G. 551.
(4) 46 L. J. Ch. 268.
(5) 10 Beav. 200.
(6) 2 Ph. 107.
(7) 50 L. T. 22.

Barton J.
1915.
McKenna
v.
McCarten.

to under the will of my brother Thomas McCarten." It is admitted that the bequest of furniture is an absolute one. The bequest of "money in bank," which is bracketed with the furniture, and is given by the same words, is, in my opinion, also an absolute one.

The words "to be given to him at the rate of £2 per month during his life" are not words of bequest. "To be given" means "to be given by the executors." It is a mere direction to them. The words "during his life" are part of that direction, and do not qualify the words of bequest. The testatrix wished the money to be doled out to the legatee in monthly instalments. In other words, she wished to impose a restraint on the legatee's power of alienation which would be repugnant to the absolute gift.

The words "and should any portion be remaining at his death he to have power to dispose of it by will," carry out testatrix's idea of giving an absolute gift with a restraint on alienation during lifetime.

It is important to note that there is no gift over. Nobody except John McCarten is given any beneficial interest in the bequest. In addition to the cases which have been cited, reference may be made to *Doe* d. *Herbert* v. *Thomas* (1). That was a case of a devise of real estate, but otherwise bears a close resemblance to this bequest, which I have no difficulty in holding to be an absolute one.

Solicitor for the executors: *P. J. Lavery.*
Solicitor for the defendant: *E. O'Hagan.*
Solicitors for the next-of-kin: *Best & Best.*

R. W. L.

(1) 3 Ad. & E. 123.

IN RE HAZLETTE (1).

Appeal.
1915.
May 11, 12.

Local Registration of Title—Registration subject to Equities—Jurisdiction of Registering Authority to cancel Note as to Equities where no Burdens to be entered—Statute of Limitations—Legacy charged on Land—Express Trust—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *ss.* 8, 10 —*Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8—*Judicature* (*Ireland*) *Act*, 1877 (40 & 41 *Vict. c.* 57), *s.* 28, *sub-s.* 2—*Local Registration of Title* (*Ireland*) *Act*, 1891 (54 & 55 *Vict. c.* 66), *s.* 29.

Sect. 29, sub-s. 2, of the Local Registration of Title (Ireland) Act, 1891, provides for dispensing, on first registration of a person as owner of lands purchased under the Land Purchase Acts, with the ascertainment of burdens arising from the interest vested in the purchaser being deemed a graft upon his previous interest, in which case (sub-s. 3) the registering authority is to note on the register that the registration is made subject to equities arising from the interest vested in the purchaser being deemed such graft. By sub-s. 4, the registered owner may apply to the registering authority to ascertain and enter on the register any burdens the ascertainment of which may have been so dispensed with, and the registering authority "shall thereupon ascertain and enter such burdens on the register, and shall cancel such note as aforesaid."

Held, that the registering authority has jurisdiction to cancel the note as to equities, not merely where burdens are ascertained and entered, but also where it appears that there are no burdens.

A testator left a farm to A, adding, "I direct that he shall pay the following legacies which I hereby charge upon my said farm," the legacies being set out. He appointed A sole executor. The testator died in 1891, and A proved the will, and went into possession of the farm. He subsequently purchased it under the Land Purchase Acts, and, in 1905, was registered in the Land Registry as owner, subject to equities. A died, having devised the lands to B, and appointed B executor. No payment had ever been made on account of the legacies, or any acknowledgment given in respect of them. There were no other charges on the lands. B applied to the registering authority to have the note as to equities cancelled.

Held, that the legacies were not secured by an express trust; that, even if they had been so secured, the claims of the legatees were barred as against the lands by sect. 10 of the Real Property Limitation Act, 1874, and that B was entitled to have the note as to equities cancelled.

(1) Before O'BRIEN L.C., CHERRY L.C.J., and RONAN L.J.

Appeal. 1915. *In re* HAZLETTE.

APPEAL from a decision of Madden J., sitting as Land Judge for the purposes of the Local Registration of Title (Ireland) Act, 1891.

Alexander Hazlette was at the time of his death yearly tenant of a farm of land in the townland of Brownknowe, county Donegal. By his will, dated the 9th December, 1891, he directed that his brother, John Hazlette, should "have the option of retaining my farm of land at Brownknowe and in the event of his electing to retain the same I direct that he shall pay the following legacies which I hereby charge upon my said farm viz.:—To Martha Hazlette, Melbourne, Australia, £20; to Catherine Neely, Australia, £20; to Margaret Crann, New Zealand, £20; to Margery Starrell, Philadelphia, £20; to Kezia Hazlette, Philadelphia, £20; to Mary Anne Hazlette, my sister-in-law, £10; to Samuel Hazlette, of Ramelton, my nephew, £10; to Mary Anne Hazlette, my sister, of Melbourne, the sum of £87; to Jane Hazlette, of Melbourne, the sum of £87; and in the event of my brother John Hazlette declining to retain said farm I then direct the same to be put up for sale by public auction together with all my stock crops and chattels of every kind and out of the proceeds thereof to pay the above-mentioned legacies, and also to pay the further legacy of £100 to my said brother John Hazlette and should my said farm crop stock and chattels not realize a sufficient sum to pay such legacies I then direct that all said legacies save that bequeathed to my brother John Hazlette shall abate rateably." The testator appointed his brother, John Hazlette, executor and residuary legatee of his will.

The testator died on the 10th December, 1891, and probate of his will was granted to John Hazlette on the 13th May, 1893.

On the death of Alexander Hazlette, John Hazlette entered into possession of the farm, and remained in possession up to his death. Some years after going into possession he purchased the holding under the provisions of the Land Purchase Acts. On the 27th of October, 1904, the lands were vested in him by fiat of the Land Commission, and on the 20th April, 1905, he was registered in the Land Registry as owner in fee-simple of the lands, subject to rights or equities, if any, arising from the interest vested in

him by fiat of the Land Commission, dated the 27th October, 1904, being deemed to be a graft on his previous interest in the land, or arising in any other manner from the existence of such interest.

John Hazlette died on the 23rd April, 1912, having by his will, dated the 3rd March, 1908, devised and bequeathed all his real and personal property to his wife, Sarah Anne Hazlette, and appointed her executrix thereof. Probate of this will was granted to Sarah Anne Hazlette on the 10th June, 1912.

No payment had ever been made on account of any of the legacies bequeathed by the will of Alexander Hazlette, or any acknowledgment given in respect of them.

An application was lodged by Sarah Anne Hazlette in the Local Registration of Title Office, Donegal, on the 11th January, 1913, requesting the registrar to investigate the title to the tenancy; to ascertain and enter on the register the burdens, if any, appearing on such investigation to affect the lands; and to cancel the note as to equities entered on the folio. The registering authority refused to register the applicant discharged from equities. She then applied by motion on notice to Madden J. for an order that she should be registered as full owner of the lands discharged from equities. Madden J. postponed the hearing of the application, and directed certain advertisements to be published. Several of the legatees made claims. The motion was re-entered, and heard before Madden J. on the 27th January, 1915. He held that the legacies were secured by an express trust, and were not affected by the Statute of Limitations (1).

Sarah Anne Hazlette now applied to the Court of Appeal, asking that the order of Madden J. declaring that the legacies bequeathed by the will of Alexander Hazlette were secured by an express trust might be discharged, and that it might be declared that in the events which had happened the said legacies had ceased to be a charge upon the lands, or to be payable by Sarah Anne Hazlette.

(1) *In the Matter of the Local Registration of Title and John Hazlette*, 49 I. L. T. R. 67.

Appeal. 1915. *In re* HAZLETTE.

Leech K.C. and *Babington*, for the appellant:—

The claim against the lands in respect of the legacies is barred by the Statute of Limitations. The legacies are merely charged on the lands, and are not secured by an express trust: *Hodge* v. *Churchyard* (1); *Dickenson* v. *Teasdale* (2); *Hughes* v. *Kelly* (3); *Cunningham* v. *Foot* (4); *In re Barker*, *Buxton* v. *Campbell* (5); *In re Jane Davis*, *Evans* v. *Moore* (6); *Piggott* v. *Jefferson* (7). Even if there was an express trust, the claim against the lands would be barred: Real Property Limitation Act, 1874, s. 10. The registering authority, therefore, should have determined that these legacies were not burdens on the land, and should have cancelled the note as to equities, as provided by sect. 29, sub-s. 4, of the Local Registration of Title (Ireland) Act, 1891. [O'Brien L.C.: In a case like this, where the right is not extinguished, are you entitled in substantive proceedings to apply for a declaration that the claims are barred, as distinct from relying on the statute as a defence?] The duty of the registering authority is to ascertain the burdens which affect the lands, and enter them on the register. In order to do this he must determine whether alleged burdens are enforceable against the lands or not, and must enter on the register only subsisting and enforceable burdens. In proceedings before the Land Judge for a declaration of title, the owner of the lands is entitled to have claims barred by the Statute of Limitations disallowed. In the distribution of the purchase-money of lands sold under the Land Purchase Acts, claims barred by the statute will not be paid: *In re Blennerhassett's Estate* (8).

Morgan Byrne, for the legatees:—

The direction to John Hazlette to pay the legacies in the event of his retaining the farm constitutes him an express trustee. The fact that the legacies are also charged on the lands cannot make the position of the legatees worse. Moreover, John Hazlette

(1) 16 Sim. 71.
(2) 1 De G. J. & S. 52.
(3) Dr. & War. 482.
(4) 3 A. C. 974.
(5) [1892] 2 Ch. 491.
(6) [1891] 3 Ch. 119.
(7) 12 Sim. 26.
(8) [1911] 1 I. R. 16.

was an executor of the will, and he has constituted himself a trustee. [He referred to *In re Timmis*, *Nixon* v. *Smith* (1); *Tyson* v. *Jackson* (2); *In re Lacy*, *Royal General Theatrical Fund Association* v. *Kydd* (3); Judicature Act, 1873, sect. 25, sub-s. 2; Judicature (Ireland) Act, 1877, sect. 28, sub-s. 2; Trustee Act, 1888, s. 8.]

Assuming that the Statute of Limitations would apply to a case of this kind, it can be relied on only as a defence. The case is not within sect. 34 of the Real Property Limitation Act, 1833, and, accordingly, the effect of the statute is not to extinguish the right, but merely to bar the remedy. The statute cannot, therefore, be relied on by the appellant here, who is coming forward actively as an applicant under sect. 29 of the Local Registration of Title Act, 1891.

The appellant, in her notice of appeal, asks that it may be declared that the legacies have ceased to be payable by her. She is clearly not entitled to this declaration, since the rights of the legatees against her personally are preserved by sub-s. 1 of sect. 8 of the Trustee Act, 1888, the property being still retained by her.

Under sub-s. 4 of sect. 29 of the Local Registration of Title Act, the registering authority has no jurisdiction to cancel the note as to equities except in a case where he ascertains and enters burdens on the register.

O'BRIEN L.C.:— May 12.

In this case my sympathy is with the respondents, and if the point on the Statute of Limitations could be got over I should like to decide in their favour, because what has happened here is an instance of what often happens in this country, of members of a family going abroad to America or other places, and getting out of touch with the people at home, and a person here taking out probate or administration, and going into possession of lands, and, by his silence on the subject, preventing those who may have charges from learning that they have them, or making claims, so that the person in possession ultimately acquires a title under the

(1) [1902] 1 Ch. 176.
(2) 30 Beav. 384.
(3) [1899] 2 Ch. 149.

Appeal. 1915.

In re HAZLETTE.

O'Brien L.C.

Statute of Limitations. It is not, however, for us to make the law. The law is there, and if it works a hardship we cannot help it.

In the present case a man named Alexander Hazlette, by his will, directed as follows:—"I direct that my brother John Hazlette shall have the option of retaining my farm of land at Brownknowe, and in the event of his electing to retain same I direct that he shall pay the following legacies which I hereby charge upon my said farm"; and then follow the legacies, most of which were given to persons who were at that time out of the jurisdiction. There was then an alternative provision:—"In the event of my brother John Hazlette declining to retain said farm I then direct same to be put up for sale by public auction together with all my stock crop and chattels of every kind and out of the proceeds thereof to pay the above-mentioned legacies and also to pay the further legacy of £100 to my said brother John Hazlette." And the testator appointed his brother John executor of his will.

The testator died on the 10th December, 1891, and John proved the will. He entered into possession of the farm, and ignored the existence of any of these legatees. He subsequently purchased the farm under the Land Purchase Acts, and was registered in the Land Registry as owner subject to equities. He died on the 23rd April, 1912, and is now represented by his widow, the executrix of his will and the universal devisee and legatee under it. She contends that she is entitled to have the note that the registration is subject to equities expunged.

The question arises on a requisition made by her to the registering authority, and afterwards heard before Madden J. The requisition requests the registering authority to investigate the title to the tenancy; to ascertain and enter on the register the burdens (if any) appearing on such investigation to affect the lands, and—and this is the material part—"to cancel the note as to equities entered on the said folio."

A question as to jurisdiction has been raised here *in limine* by Mr. Morgan Byrne. It was not, as well as I understand, raised before Madden J. The registration was unquestionably a registration subject to equities, and was made pursuant to sub-sect. 2 of sect. 29 of the Local Registration of Title (Ireland) Act,

Appeal.
1915.

In re
HAZLETTE.

O'Brien L.C.

1891, and the only question of any difficulty in the case, so far as I can see, is the question of the construction of this 29th section, having regard to the very far-reaching argument to which Mr. Byrne asked us to accede.

Sub-sect. 1 of sect. 29 enacts that before first registration of a person as owner of lands purchased under the Land Purchase Acts, the registering authority shall, if so required by the applicant for registration, ascertain and enter on the register all burdens which, upon the prescribed examination of title, appear to affect the land, except those to which, though not registered, all registered land is declared subject. Now, if the legacies here had been enforceable against the lands at the time of registration, they would, of course, have been burdens which could have been made the subject of investigation and determination by the registering authority. In consequence of the practical impossibility of investigating the title upon first registration in every case where lands were purchased under the Land Purchase Acts, the procedure authorized by sub-s. 2 of the section has been almost universally adopted. That sub-section provides that where the applicant does not require all burdens to be ascertained, the registering authority may, if he thinks fit, dispense with the ascertainment of such of the burdens affecting the land as have arisen from the interest vested in the purchaser being deemed to be a graft upon his previous interest. These burdens may be conveniently described as "graft burdens." Where the registering authority dispenses with the ascertainment of such burdens, he is to ascertain and enter on the register all other burdens which, upon the prescribed examination, appear to affect the land, except those to which, though not registered, all registered land is declared by the Act to be subject, and, by sub-section 3, he is to note in the register that the registration is made subject to any rights and equities arising from the interest vested in the purchaser being deemed a graft upon his previous interest.

Registration under the Act is compulsory in the case of lands purchased under the Land Purchase Acts, and whether the purchasing tenant is, or is not, technically, the applicant for registration, the proceedings to register are taken by the Land Commission transmitting a notice to the registering authority,

Appeal. 1915. *In re* HAZLETTE. O'Brien L.C.

who must proceed to register the purchaser accordingly: section 23, sub-section 1 (*b*). But, whether the proceedings are carried on by the Land Commission or by the purchasing tenant, the registration is usually effected in this form of dispensing with the ascertainment of graft burdens, and entering a note to that effect on the register. That was the course adopted in the present case, and we have, therefore, got a title, otherwise complete and perfect, which may be subject to certain burdens which have arisen from the interest vested in the purchaser being deemed a graft on his previous interest, that is, burdens which, if investigated, would be found to be real, operative, and enforceable burdens at the date of the inquiry. The registering authority dispenses with an inquiry as to whether or not there are any such burdens, but he decides nothing else.

Sub-sect. 4 of sect. 29 might at first sight appear to support Mr. Byrne's argument. It provides that "The registered owner may at any time apply to the registering authority in the prescribed manner to ascertain and enter on the register any burdens the ascertainment of which may have been dispensed with under the provisions of this section, and the registering authority shall thereupon ascertain and enter such burdens on the register." I stop for the present there. Mr. Byrne contends that on the literal construction of these words the registered owner can only come to the registering authority for the purpose of having defined in express terms burdens which must be considered to have existed at the date of registration, and that he is not entitled to say, "If you had not dispensed with the ascertainment of graft burdens, you would have found that there were none existing at that date, and that there was no necessity for entering the note on the register." Indeed, it comes to this, that because the registering authority dispenses with this ascertainment, it in substance declares that the land is subject to burdens which in fact do not affect it. But the latter part of the sub-section, to which attention was drawn by Lord Justice Ronan during the argument, makes, I think, the matter clear, and enables us to avoid putting upon an Act passed for the purpose of simplifying titles an interpretation which would leave nearly every title in a state of hopeless confusion. The sub-section goes on: "and shall cancel such note as aforesaid, the

entry whereof shall thenceforth be of no force or effect." You may, of course, cancel the note by substituting something else, but you may equally cancel it by ascertaining that there are no burdens. I consider that the effect of section 29 is that there may be a postponement of the inquiry which would otherwise have been held on first registration, and that the registered owner may at any time take up that postponed inquiry, and have the register placed in the same position as if there had not been a temporary dispensation with such inquiry. The dispensation is a temporary one, and not a permanent one which would prevent the registering authority, except where there was a real operative charge to be defined, from ever considering whether the note as to equities could or could not be got rid of.

I think that section 45 shows the general power of the registering authority as to burdens. Sub-sect. 1 specifies the burdens which may be registered as affecting registered land, and sub-sect. 4 provides that "The registering authority may, on the prescribed evidence and subject to the prescribed conditions, modify or cancel any entry under this section of a burden," with an exception not material to the present case. I refer to this section merely as indicating that the framers of the Act had in view that the registration should show the true state of the title. To suggest that section 29 has the effect of preventing this being done in the one case where it would be most necessary, appears to me to put an impossible construction on the section.

This disposes of what I regard as the only question in the case requiring to be referred to at any length.

I am of opinion that the claim of the legatees as against the lands is barred by the Statute of Limitations. The case in the House of Lords of *Cunningham* v. *Foot* (1) is a clear authority that the legacies are not secured by an express trust (see especially the judgments of Lord Cairns and Lord O'Hagan); but even if they were so secured, the claims would be barred as against the lands by sect. 10 of the Real Property Limitation Act, 1874. It is argued that because there might be some personal liability on the part of the trustee under sect. 8 of the Trustee Act, 1888, the

(1) 3 A. C. 974.

Appeal. 1915. *In re* HAZLETTE. O'Brien L.C.

claim as against the lands is not barred. I fail to appreciate this argument. So far as the lands are concerned the claim is barred, trust or no trust.

That being so, I think that the registering authority is bound to determine that these legacies are not burdens, and to cancel the note as to equities.

The appellant, however, is not entitled to all that she asks in her notice of appeal. The declaration should, in my opinion, be confined to the one point of expunging the reservation as to equities.

Cherry L.C.J. concurred.

RONAN L.J. :—

I concur. The lands in this case were registered with a note on the register that the registration was subject to any rights and equities arising from the interest vested in the purchaser being deemed a graft upon his previous interest or arising in any other manner from the existence of such previous interest. This was done under the provisions of sub-ss. 2 and 3 of sect. 29 of the Local Registration of Title (Ireland) Act, 1891, which give the registering authority a discretion to dispense with the ascertainment of burdens arising from the interest vested in the purchaser being deemed a graft on his previous interest, and to register subject to any such, putting on the register a note such as was put on it in the present case.

Sub-s. 4 of the same section, in my opinion, provides for (1) getting rid of that note, and (2) ascertaining and substituting the actual burdens, if any. Sect. 29, sub-s. 4, says :—"The registered owner may at any time apply to the registering authority in the prescribed manner to (*a*) ascertain, and (*b*) enter on the register, *any* burdens the ascertainment of which may have been dispensed with under the provisions of this section. And the registering authority shall thereupon (*a*) ascertain, and (*b*) enter such burdens on the register, and (*c*) shall cancel such note as aforesaid, the entry whereof shall thenceforth be of no force and effect." (The letters (*a*), (*b*), and (*c*) have been added by me.) We are seriously asked to say that if he ascertains that there are no such burdens, he is not "to cancel such note," but that "the entry

thereof shall thenceforth be of full force and effect." In other words, that a man with an unencumbered estate in fee is precluded from having it registered as such. I am of opinion that this is not only absurd, but that the section imposes the absolute duty to cancel the note in all cases.

I should like to say a word as to the argument of Mr. Morgan Byrne on the sections of the English and Irish Judicature Acts as to the effect of the Statute of Limitations in the case of express trusts.

The English Judicature Act of 1873 provided, by sect. 25, sub-s. 2, that no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of trust, should be barred by any Statute of Limitations. Then came the Real Property Limitation Act of 1874, sect. 10 of which provided that after the commencement of the Act no action should be brought to recover any sum of money or legacy charged upon or payable out of any land and secured by an express trust, except within the time within which the same would be recoverable if there were not any such trust. That Act did not come into operation until the 1st January, 1879, so that in the meantime the provisions of the section of the English Judicature Act of 1873 remained in force, but the moment the Act of 1874 came into operation that section was repealed. The Irish Judicature Act of 1877 contained, in sect. 28, sub-s. 2, a provision similar to that in sect. 25, sub-s. 2, of the English Act; but as the Irish Act was passed subsequently to the Real Property Limitation Act of 1874, it was necessary to have a provision that it should not affect that Act when it came into force, and accordingly sect. 28, sub-s. 2, went on to enact that the provision in that section was not to affect the enactments contained in the 10th section of the Real Property Limitation Act, 1874, when the same should come into effect. The result is that as regards a legacy charged on land it is immaterial whether it is secured by an express trust or is not.

Solicitors for the appellant: *Caldwell & Robinson.*
Solicitors for the respondents: *J. L. Scallan & Co.*

J. G. T.

Barton J.
1915.
Jan. 13, 14, 15, 20, 28.

WOODHOUSE *v.* HOONEY.

(1914. No. 223.)

Statute of Limitations—Landlord and Tenant—Tenancy at Will—Determination of—Real Property Limitation Act, 1833 (3 & 4 *Wm.* 4, *c.* 37), *s.* 7.

A tenancy at will may be implied where a person enters into and remains in occupation of lands and the enjoyment of the profits, by arrangement with the owner, without payment of rent, and not as agent, or under any express contract of tenancy. If the owner visits the lands in the character of owner, and exercises rights of ownership *animo possidendi*, such visits may prevent the Statute of Limitations from running in favour of the tenant at will.

A, being absolutely entitled to lands subject to a jointure payable to his mother, by deed executed in the year 1897, and duly registered, conveyed the lands to his mother; but, by her permission, he continued to reside on the lands. He paid his mother her jointure by instalments, and was never asked to account for the surplus profits. His mother paid him periodical visits, lasting for several weeks at a time. On these occasions she assumed the character of owner, gave directions as to household and family arrangements, and was addressed and treated as "the mistress."

Held, that A occupied the lands as tenant at will to his mother, and that his mother's visits determined the tenancy at will so as to prevent the Statute of Limitations running in favour of A.

TRIAL OF ACTION.

The following statement of the facts is taken from the judgment of Barton J.

This was an action to recover possession of lands. The plaintiff claimed under the will of Mrs. Catherine Edge, otherwise Murdoch. The defendants claimed under the will of John Fitzsimons Edge. John Fitzsimons Edge was absolutely entitled to the lands of Milltown, in Queen's County, subject to a jointure of £30 payable to his mother, Mrs. Catherine Edge. His mother had resided with him at Milltown, until she married a second husband named Murdoch. After her marriage, Mrs. Murdoch left Milltown, and went to live with her husband in Belfast. John Fitzsimons Edge was of such intemperate

habits as to require continual watching and protection, for which purpose his mother engaged a housekeeper named Kate Moore.

On the 4th October, 1897, while John Fitzsimons Edge was on a visit to his mother accompanied by his housekeeper, a deed was executed in Belfast by which he conveyed and assigned to his mother, Mrs. Murdoch, all his property of every description, lands and chattels, to hold unto her, her heirs, executors, administrators and assigns absolutely, subject to the right of Catherine Moore and her heirs to occupy and enjoy for ever free of rent the cottage on his farm known as Bridge House, and subject also to the payment of two sums of £100 each to the said Catherine Moore, and to one Catherine Gwen respectively. The deed was registered. The object of this transaction was to protect John Fitzsimons Edge, not so much from creditors as from himself, and from designing persons by whom he was liable to be beset. John Fitzsimons Edge afterwards became dissatisfied about the transaction. In 1901, his mother wrote encouraging him to consult a solicitor, but advising him that the deed was for his benefit and protection, and that she wanted nothing out of it except "her own," *i.e.* her jointure; that she had by will left the place to him for life; and that he would not be disturbed during her life.

Mrs. Murdoch devised the lands of Milltown to John Fitzsimons Edge for life, and after his death, in the events which happened, to the plaintiffs. John Fitzsimons devised and bequeathed whatever property he might die possessed of to the defendants. The case mainly turned upon whether Mrs. Murdoch's rights in the lands of Milltown, which she acquired under the deed of October, 1897, were barred by the Statute of Limitations.

Oral evidence was given to the effect that John Fitzsimons Edge acquiesced in the view that the deed was a protection to a man of his unfortunate habits, and accepted the proposed arrangement, under which he paid his mother her jointure, and took the rest of the profits, whatever they were.

The plaintiff, Mrs. Woodhouse, a sister of John Fitzsimons Edge, deposed that on one occasion, about 1906, Edge told her that he could not marry, because he had nothing to marry on, as he was only managing for his mother, and that on another

Barton J. 1915. WOODHOUSE v. HOONEY.

occasion, a fortnight before his death, he told her that his mother owned everything; that he was only managing, and that she had left everything to her, Mrs. Woodhouse. Another sister of John Fitzsimons Edge, Mrs. Gilborne, gave evidence of other conversations with her, in which Edge made statements to the same effect. A local auctioneer named Peter Doyle, a police pensioner and insurance agent named Thomas English, and a labourer named Rice, gave evidence of admissions by Edge to the same effect. English deposed to a conversation about a proposed insurance of Edge's labourers. Edge said that he could not effect the insurance without acquainting his mother. He also told English, when the latter asked him to do something for Kate Moore, that he had no power to make a will, and that Kate Moore was entitled to £100 under the deed by which he had conveyed the place to his mother. Another witness, named Curran, said that Edge told him that the Bridge House (which had been given to Kate Moore by the deed of October, 1897) belonged to Kate, and asked him, when employing him to do some work in the cottage, "to do a good job for Kate."

Evidence was given of the recognition of the deed, by both John Fitzsimons Edge and by Mrs. Murdoch, in a transaction with the Hibernian Bank. It appeared that before the execution of the deed, in 1896, Edge had borrowed £150, and deposited with the bank the fee-farm grant, and had signed a bill of exchange as collateral security. In the year 1898, in consequence of the execution of the deed, he desired the manager of the bank to ask his mother to sign a renewal bill, which she did. She also deposited a copy of the deed as collateral security. Edge must have known that the deed remained as security for his debt. It appeared from the bank manager's letter of the 3rd October, 1898, that Edge had desired the bank to get his mother to join in the bill, and that he had done so in consequence of the assignment of the place, which had been made by him to her on October 4th, 1897.

In January, 1911, the local district council obtained John Fitzsimons Edge's leave for the erection of a pump on the lands of Milltown, and took steps towards its erection. Kate Moore informed Mrs. Murdoch, who sent a peremptory telegram to the

council informing them that she was the owner, and refusing her consent, on receipt of which the council apologized, and with Edge's consent abandoned the proposal. The letters written by Mrs. Murdoch to her son after 1897 proceeded upon the basis that the mother's ownership was always there for his protection, and that the beneficial occupation of the lands was to be Edge's, upon the understanding that he paid his mother her jointure.

On the other hand, there was a considerable body of evidence upon which the defendants relied. John Fitzsimons Edge always paid the rent and the rates, and received receipts in his own name. A fair rent had been fixed in his name before the date of the deed. After the execution of the deed, the lands, which were held under yearly and judicial tenancies, were purchased under the Land Purchase Acts, and the documents were made out and were filled up in his name. He always paid his mother her jointure by instalments, receiving receipts from her from time to time in discharge of all moneys due by him to her, and he was never asked to account for the surplus profits. It also appeared that Edge obtained an ejectment decree against a sub-tenant named Casey; and that in 1904 he received £10 for a labourer's plot taken by the local authority under the Labourers Acts.

The defendants also relied upon an application made by Mrs. Murdoch for an old age pension shortly before her death, in which she described herself as "having nothing, and being supported by her son, John Edge." The declaration was made a few weeks before her death, and was not acted upon. It appeared from the evidence of several witnesses, including Pender, a herd, and Daly, a labourer, that Mrs. Murdoch paid a number of visits to the farm. These visits extended from three weeks to five weeks, and occurred more frequently than once in every two years. On the occasion of these visits to Milltown she gave directions as to the disposition and management of things in the house and on the lands—for example, as to the changes of furniture and farm stock, as to the cutting of hedges, and as to the sowing of crops, and she was addressed and treated as "the mistress."

Barton J.
1915.
WOODHOUSE
v.
HOONEY.

[The action was also conversant with a claim in respect of the stock on the lands, which is not included in this report.]

Ronan K.C., *FitzGibbon K.C.*, and *Swaine*, for the plaintiffs.

Blood K.C., *Herbert Wilson K.C.*, *Brunskill K.C.*, and *Herbert Jones*, for the defendants.

Cur. adv. vult.

Jan. 28.

BARTON J., having stated the facts, continued:—

This action is in substance an equitable ejectment, in which the plaintiff seeks to recover possession of the lands of Milltown. The only defence to the action rests upon the Statute of Limitations, and the whole case turns upon the precise character in which John Fitzsimons Edge occupied the lands of Milltown from 1897 to 1914. The plaintiffs say that he was a bailiff or manager, and that the statute never began to run in his favour. In the alternative they say that, on the evidence, he was a permissive occupant, and therefore a tenant at will, and that the frequent visits to the land of the true owner terminated the tenancy at will and stopped the running of the statute from time to time. On the other hand, the defendants say that he occupied as beneficial owner or as a trespasser, and that the Statute of Limitations had run in his favour in the year 1909.

Down to 1897 John Fitzsimons Edge was entitled absolutely, under his father's will, to the lands of Milltown, subject to a jointure of £30 payable to his mother. Mother and son lived together until she married a man named Murdoch, and went to reside with her second husband in Belfast. John Fitzsimons Edge was a drunkard, and an easy prey for designing persons. For his protection from harpies, he assigned the lands to his mother absolutely in October, 1897, and it was afterwards arranged between mother and son that he should reside on the lands, and manage and enjoy them, and that he should pay her jointure to her, but that she should remain as owner for his protection. Such an arrangement would be an extraordinary one between strangers, but, as between this mother and this son, was prudent and natural. What, in fact and in law, was the relation of son and mother after the execution of the deed? The correspondence

of 1901 leads to the inference that there was an affirmative consent by the mother, who was the legal owner, to the continued possession of the son; and that his occupation was an occupation by permission, and not an occupation as bailiff, of which accountability is characteristic, or as a trespasser. There could be no trespass where there was an understanding on both sides as to the conditions and as to the continuance of occupation. A tenancy at will may be implied when a person enters into and remains in occupation and in enjoyment of the profits of land, by arrangement with the owner, without payment of rent, and not as agent, or under a contract of tenancy: *Doe* v. *Wood* (1); *Doe* v. *Groves* (2).

I now come to the evidence as to the conduct and acts of the parties subsequent to the correspondence of 1901. There is no allegation of any acknowledgment in writing within sect. 14 of the Real Property Limitation Act, 1833; and the greater part of the evidence on both sides is only material in so far as it bears upon one or both of two disputed questions—first, the character of John F. Edge's occupation after the execution of the deed; and, secondly, the character in which Mrs. Murdoch entered upon the lands on the occasion of a number of visits which she paid to the property from time to time. The plaintiffs rely upon a large number of statements made by Edge as regards the character of his occupation, as well as upon the conduct and relations of the mother and son *inter se*.

It is clear that, to his mother, to his friends, and to his servants, John Fitzsimons Edge frequently declared that his mother was owner of the place, and that he was not the owner. These admissions would not *per se* prevent the Statute of Limitations from running, nor would they defeat the effect of the Statute if it had once run its course; but they are important as showing that from first to last his occupation was not that of a trespasser, but was recognized by him as permissive. Channell J. in *Jarman* v. *Hale* (3) expressed the opinion that a definite acknowledgment of permissive occupancy may be evidence of a tenancy at will.

(1) 14 M. & W. 682, 687.
(2) 10 Q. B. 468.
(3) [1899] 1 Q. B. 994, 995, 999.

Barton J.
1915.
WOODHOUSE v. HOONEY.

The plaintiffs also rely upon several other material facts. The deed was registered within a year of its execution, which takes it out of the class of pocket instruments. It was recognized in a very solemn way from year to year for a number of years by both Edge and his mother in a transaction with the Hibernian Bank, where it was deposited as security for a debt which Edge owed to the bank. Then we have Edge recognizing his mother's authority in the matter of the erection of a pump by the district council; and we also find him recognizing the provisions in favour of Kate Moore which were contained in the deed.

The evidence relied upon by the defendants was in most instances consistent with the hypothesis of a permissive occupation. The documents in the Fair Rent and Land Purchase transactions were made out in Edge's name, but it is common to find that a judicial tenant or a purchaser of lands under the Land Purchase Acts is not the real owner of the beneficial interest. Then, as regards the transaction about labourers' cottages, it has been pointed out that, under the Labourers Acts and the Lands Clauses Acts, the district council were at liberty to treat the party in possession as prima facie the owner. It is true that the evidence of the defendants' witnesses goes far to negative the theory that Edge was a mere bailiff, and to support the view that he was in beneficial enjoyment of the land, and that he exercised acts which would ordinarily be regarded as acts of ownership. But when we remember that the mother resided in Belfast, and that she expressly offered to allow him to enjoy the lands during his life, the evidence is not inconsistent with the view that his occupation was permissive.

The most serious piece of evidence on defendants' behalf was Mrs. Murdoch's declaration under the Old Age Pensions Act. But the statement was never acted on, and is so wide of the truth that it cuts both ways. She declared that she had nothing, although she was receiving £30 a year jointure, and the payment to her of that jointure is one of the circumstances upon which defendants rely. I do not feel bound to decide this case upon a declaration made by a feeble old woman, which is contradicted by so many facts and circumstances.

Upon a review of the whole evidence, I come to the conclusion that Edge was allowed by his mother to occupy and enjoy these lands under an arrangement and understanding with her which he frequently recognized; that his occupation was permissive; and that, as a legal consequence, the relation between mother and son was that of tenant at will. Under these circumstances the question remains whether Mrs. Murdoch's visits to the farm were of such a character as to determine that tenancy at will, and stop the running of the Statute of Limitations. These visits were made more than once in every two years, and lasted for several weeks. On these occasions Mrs. Murdoch assumed the authority of owner, gave directions as to household and farming arrangements, and was addressed and treated as "the mistress." Visits of this kind were held to determine a tenancy at will, and to prevent the running of the Statute of Limitations in favour of the tenant at will, in *Doe* v. *Groves* (1). I infer that these visits were not mere visits of a mother to her son as his guest, but were the visits to her own home of the true owner, made in the character of owner, exercising rights of ownership with that conscious sense of ownership, and with that intention to maintain it, which we call the *animus possidendi*. If I am right in drawing that inference, it seems to follow that the defence of the Statute of Limitations fails, and that the plaintiffs are entitled under Mrs. Murdoch's will to the lands of Milltown.

Solicitor for the plaintiffs: *William P. Triston.*
Solicitor for the defendants: *Horace Turpin.*

D. M. S.

(1) 10 Q. B. 486.

M. R.
1915.

June 8.
July 20.

In re CROSS'S TRUSTS.

CROSS *v.* CROSS.

Settlement—Real Estate—Limitations—Equitable Estate in Fee—No Words of Inheritance—Estate for Life or in Fee-Simple—Intention.

A limitation, in a deed, of an equitable estate without words of limitation, may confer the equitable fee where the intention to do so appears from the deed.

By deed, reciting that C. had agreed, in consideration of B. paying off certain debts of C., to convey certain lands, held in fee-farm, to a trustee in trust for B. and his wife during their lives, with remainder to C. and his wife during their lives, with remainder, subject to a sum of £600 charged in favour of the eldest son of C. and his issue, in trust for the children of C. and his wife as he should appoint, and, in default of appointment, for all the children save the eldest son, C. conveyed the lands unto and to the use of a trustee and his heirs upon the trusts so agreed upon, the ultimate trust being for the children of C. as he, or in default his wife, should appoint, and in default of such appointment "then to such issue save the eldest son, share and share alike." The lands were not of very great value.

Held, that there was sufficient evidence on the face of the instrument to show that it was the intention of the settlor to dispose of his whole estate, and that the younger children, notwithstanding the absence of words of inheritance in the limitation to them in default of appointment, took an equitable estate in fee-simple, as tenants in common in equal shares, in the lands.

In re Tringham's Trusts, Tringham v. *Greenhill*, [1904] 2 Ch. 487, *In re Houston, Rogers* v. *Houston*, [1909] 1 I. R. 319, and *In re Stinson's Estate*, [1910] 1 I. R. 47, followed.

Meyler v. *Meyler*, 11 L. R. Ir. 522, and *Bennett's Estate*, [1898] 1 I. R. 185, not followed.

Summons.

By an indenture dated the 12th September, 1877, and made between Richard Cross of the first part, John Cole Bowen of the second part, and Warren Gillman Crooke of the third part, reciting that the said Richard Cross was seised of the lands of Cronodybeg, containing 77A. 2R. 13P. Irish plantation measure,

held under a fee-farm grant dated the 2nd October, 1857, at the yearly fee-farm rent of £57 6*s.* 2*d.*, and that it had been agreed by and between the said Richard Cross and the said John Cole Bowen that, in consideration of the said John Cole Bowen paying off the debts of the said Richard Cross thereinafter mentioned, and amounting in the whole to a sum not exceeding £1006 7*s.* 3*d.* or thereabouts, the said Richard Cross should convey to the said Warren Gillman Crooke, as a trustee, the said lands of Cronodybeg as held under the said fee-farm grant of 2nd October, 1857, in trust for the said John Cole Bowen and his wife, Catherine Travers Bowen, during their lives and during the life of the survivor of them, and after the decease of such survivor for the said Richard Cross and Harriett Cross, his wife, for their lives and the life of the survivor, and after the decease of the said Richard Cross and his wife, subject to the life estates of the said John Cole Bowen and Catherine Travers Bowen, his wife, for such of the children of the said Richard and Harriett Cross as the said Richard Cross should by deed or will appoint, subject as hereinafter mentioned, and, in default of appointment, amongst all the children save the eldest son of the said Richard and Harriett Cross, who was thereby especially provided for, and that the said lands and premises should be charged with the sum of £600 in favour of John Cole Bowen Cross, the eldest son of the said Richard Cross, the said sum of £600 not to be raised or levied, and not to bear interest, until after the decease of the said John Cole Bowen and Catherine Travers Bowen, his wife, and of the said Richard Cross and Harriett Cross, his wife, the said Richard Cross, in consideration of the said John Cole Bowen paying off the debts of the said Richard Cross thereinafter mentioned, granted conveyed and confirmed unto the said Warren Gillman Crooke, his heirs and assigns, "All that and those the lands of Cronodybeg to hold the said premises unto and to the use of the said Warren Gillman Crooke his heirs and assigns upon trust during the lives of the said John Cole Bowen and Catherine Travers Bowen his wife to permit and suffer the said John Cole Bowen and Catherine Travers Bowen and their assigns to receive the rents and profits thereof and from and after the death of either of them to permit and suffer the survivor

M. R. 1915.

CROSS v. CROSS.

of them the said John Cole Bowen and Catherine Travers Bowen his wife his or her assigns to receive the rents and profits thereof during his or her natural life and from and after the death of the said John Cole Bowen and Catherine Travers Bowen his wife upon trust to permit and suffer the said Richard Cross and his assigns to receive the rents and profits thereof during his life and after his death upon trust to permit and suffer Harriett Cross his wife and her assigns to receive the rents and profits thereof during her natural life and from and after the death of the survivor of them the said John Cole Bowen Catherine Travers Bowen Richard Cross and Harriett Cross upon trust and to the use of the said Warren Gillman Crooke his heirs executors administrators and assigns in the first place to raise thereout a sum of £600 with interest thereon at the rate of £5 per cent. per annum from the day of the death of the survivor of the said Richard Cross and Harriett Cross and to pay the same to John Cole Bowen Cross [the eldest son of the said Richard Cross] if he shall then be living and in case of his death in the meantime leaving issue of him surviving to pay the said sum of £600 to such issue share and share alike and in case of the death of the said John Cole Bowen Cross without issue then that the said sum of £600 shall not be raised but shall merge in the inheritance and subject to the said charge of £600 upon trust as to the said lands for such one or more of the child or children of the said Richard Cross save the eldest son John Cole Bowen Cross in such shares or proportions or charged with such sum or sums as the said Richard Cross shall by deed or will appoint and in default of appointment by him as the said Harriett Cross shall in like manner appoint and in default of appointment by her then for such issue save the eldest son share and share alike."

John Cole Bowen died in the year 1885, and Catherine Travers Bowen on the 30th April, 1911. Harriett Cross died on the 17th August, 1911, and Richard Cross on the 18th December, 1911, without having ever exercised the power of appointment given to them by the settlement.

There were four children of Richard Cross and Harriet Cross: Henry, who died long before the date of the settlement, and before attaining the age of twenty-one years or marrying; John Cole

Bowen Cross, James Harris Cross (the plaintiff), and Richard Cross (the defendant). John Cole Bowen Cross predeceased his father, dying on the 22nd February, 1907, intestate, leaving his widow, but no children, him surviving.

The plaintiff and the defendant concurred in a sale of the lands to a purchaser for the sum of £500.

The present summons was taken out by the plaintiff to have it determined—1, if under the limitation in default of appointment to the issue of Richard Cross, share and share alike, the said issue took estates in fee-simple, or for life only; 2, if the said issue took estates for life only, who is entitled to the fee-simple on the deaths of the plaintiff and defendant?

Norwood K.C. for the plaintiff:—

The general principle is stated in Norton on Deeds, p. 329:—"An equitable limitation by way of trust executed, as distinguished from an executory trust, has the same construction as a legal limitation, and a grant of an equitable interest has the same construction as a grant of a legal interest." *Meyler* v. *Meyler* (1); *Bennett's Estate* (2); *In re Whiston's Settlement, Lovatt* v. *Williamson* (3); *Lucas* v. *Brandreth* (4); *Dearberg* v. *Letchford* (5), are all in my favour. It is true that the tendency of later cases has been to hold that the entire interest should pass if there is anything on the face of the deed to show that this was the settlor's intention: *In re Tringham's Trusts, Tringham* v. *Greenhill* (6), where there was a gift over in default of issue, showing that the issue (if any) were to take in fee-simple under the previous gift; *In re Oliver's Settlement, Evered* v. *Leigh* (7); *In re Thursby's Settlement, Grant* v. *Littledale* (8); but there is no such evidence of intention in the present case.

The Hon. Cecil Atkinson K.C., for the defendant:—

There is evidence here from which the Court may infer that the settlor intended the fee-simple to pass. First, he was in needy

(1) 11 L. R. Ir. 522.
(2) [1898] 1 I. R. 185.
(3) [1894] 1 Ch. 661.
(4) 28 Beav. 274.
(5) 72 L. T. 489.
(6) [1904] 2 Ch. 487.
(7) [1905] 1 Ch. 191.
(8) [1910] 2 Ch. 181.

M. R. 1915.

CROSS v. CROSS.

circumstances and anxious to make provision for his younger children, the eldest son being otherwise provided for under the settlement; secondly, the provision that, in the event of the eldest son dying without issue, the charge created in his favour should "merge in the inheritance" shows that the settlor believed himself to be dealing with the inheritance. [He referred to *Pugh* v. *Drew* (1); *In re Houston, Rogers* v. *Houston* (2); *In re Stinson's Estate* (3); *In re Tringham's Trusts, Tringham* v. *Greenhill* (4); *In re Irwin, Irwin* v. *Parkes* (5).] *Meyler* v. *Meyler* (6), in which case Chatterton V.-C. held that he was precluded from considering evidence of intention, is no longer law.

Norward K.C., in reply:—

In *In re Stinson's Estate* (3), Ross J. laid stress on the fact that the instrument which he was construing was a marriage settlement. He read in an implied gift in default of appointment—here the gift is express.

Cur. adv. vult.

July 20.

O'CONNOR M.R.:—

In this case the question for decision is whether an ultimate limitation of an equitable estate to issue contained in a deed of settlement gave an estate in fee to the members of the class constituting the issue, or only estates for life.

Richard Cross, being the owner of a fee-farm estate, and being financially involved, by indenture dated the 12th September, 1877, made between himself of the first part, John Cole Bowen and Catherine his wife of the second part, and Warren Gillman Crooke of the third part, in consideration of John Cole Bowen paying Richard Cross's debts, conveyed to Warren Gillman Crooke the lands of Cronodybeg, situate in the county of Cork, held in fee-farm, unto and to the use of Warren Gillman Crooke, his heirs and assigns, upon trust to permit John Cole Bowen and Catherine, his wife, to receive the rents and profits thereof during

(1) 17 W. R. 988.
(2) [1909] 1 I. R. 319.
(3) [1910] 1 I. R. 47.
(4) [1904] 2 Ch. 487.
(5) [1904] 2 Ch. 782.
(6) 11 L. R. Ir. 522.

their lives, and after the death of either to permit the survivor to receive the rents and profits for his or her life, and, after the death of the survivor, upon trust to permit Richard Cross to receive the rents and profits for his life, and after his death to permit his wife, Harriett Cross, to receive the rents and profits during her life, and, after the death of the survivor of John Cole Bowen, Catherine his wife, and Richard Cross, and Harriet his wife, upon trust to raise a sum of £600 for their eldest son, John, if he should be then living, and if not for his issue if any, and, subject to that trust, for such one or more of the child or children of Richard Cross except his eldest son in such shares and proportions as he should by deed or will appoint and in default of appointment as the said Harriett Cross should by deed or will appoint, and in default of appointment for such issue save the eldest son share and share alike. This is the material part of the deed.

The four tenants for life are dead. There were four children of Richard Cross, viz.:—Henry, who had died previous to the execution of the deed unmarried; John, who was the eldest son at the date of the deed, and predeceased his father without issue; James, the plaintiff in this matter, and Richard, the defendant.

There was no appointment under the deed, and the estate went as in default of appointment to the issue, share and share alike, that is, to the plaintiff and defendant.

The plaintiff contends that he and the defendant took only estates for life as tenants in common under the deed, that the estate in remainder in fee was undisposed of; that there was a resulting trust in favour of Richard Cross, the father; and that the plaintiff as his heir-at-law is now entitled to the remainder in fee, subject to the life estates. The defendant on the other hand claims to be entitled as tenant in common in fee with the plaintiff.

The first point to be observed is that the legal estate in fee was vested in the trustees of the deed, and that the limitations in favour of the beneficiaries were merely equitable.

It is elementary that technical words of conveyancing must be used for the grant of a legal estate in fee or fee tail, but there is some conflict of authority on the question whether an equitable estate may be so limited without the use of technical words, even

M. R. 1915.

CROSS *v.* CROSS.

when it appears that it was the intention of the grantor to dispose of the whole estate.

In *Meyler* v. *Meyler* (1) Chatterton V.-C. decided that the conveyance or declaration of trust of an equitable estate was subject to the same rule as the conveyance of a legal estate, and that the absence of proper words of limitation could not be cured by ascertaining the intention of the grantor or settlor. The Vice-Chancellor thought that he was precluded by the authorities from going into the question of intention.

This decision was followed by Chitty J. in *In re Whiston's Settlement*; *Lovatt* v. *Williamson* (2); but, while he adopted the Vice-Chancellor's judgment and its reasoning, he proceeded to some extent to inquire into the intention of the settlor, and satisfied himself that there was no evidence of intention to settle anything more than a life estate.

To the same effect is the judgment in *Bennett's Estate* (3), where Kenny J. laid down that in dealing with equitable interests when the trusts are executed, the same rules of construction must be invoked as in cases of legal limitations. That was the law which he considered to have been established by authorities by which he was bound.

I also would be bound by the decisions I have referred to, were it not that the current of later authorities has flowed in an opposite direction.

In *In re Tringham's Trusts*; *Tringham* v. *Greenhill* (4) the question was whether an equitable fee-simple can be conferred or created without the use of the word "heirs" in a case where the intention that such estate be conferred sufficiently appears on the face of the instrument. Joyce J. gave a considered judgment, and made a careful review of the authorities. At page 491 he quotes the older text-writers as follows:—"Mr. Butler, in his note to Coke upon Littleton, 290 b, xvi, says—'A mere declaration of trust in favour of another has been held sufficient to transfer to him the equitable fee.' And Mr. Preston, in vol. ii of his Elementary Treatise on Estates, p. 64, says:—'The general

(1) 11 L. R. Ir. 522.
(2) [1894] 1 Ch. 661.
(3) [1898] 1 I. R. 185.
(4) [1904] 2 Ch. 487.

rule is, that limitations of trust are to be construed in like manner, and by the like rules, as limitations of a legal estate; and therefore, in deeds, the fee cannot pass by grant or transfer, *inter vivos*, without appropriate words of inheritance. But in contracts to convey, and in trusts declared in a conveyance, the fee may pass, notwithstanding the omission of a limitation to the heirs. Therefore, articles to convey to A B in fee, or a conveyance to A B and his heirs, in trust, to convey to C D in fee-simple, would confer a right in equity to call for a conveyance of the inheritance. So a conveyance to A and his heirs in trust, *totidem verbis*, for B in fee, would pass a fee.' Mr. Hayes, in 5th ed. vol. i of his Introduction to Conveyancing, at p. 91, says:—'Trusts, like uses before the statute, pursued the course of succession appointed for legal interests of a corresponding description. They were expounded, too, by analogy to the rules of legal construction. But those rules did not always govern in equity with absolute sway. The rule, for example, which required the word *heirs* to pass the fee in a conveyance at common law, although it was extended to uses within the statute, was not rigidly applied to trusts. If land was limited in trust for A, without more, equity, in conformity with the rules of law, gave to A the beneficial interest for life only; but, if it could be collected from the instrument that A was meant to have the absolute interest, equity, esteeming the intention more than the rule, gave him the beneficial fee, without the aid of the word *heirs*.' In Lewin on Trusts, 10th ed., p. 117, the rule is thus stated:—'In creating a trust a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates. An equitable fee may be created without the word 'heirs,' and an equitable entail without the words 'heirs of the body,' provided words be used which, though not technical, are yet popularly equivalent, or the intention otherwise sufficiently appears upon the face of the instrument.'"

The learned judge then deals with *Holliday* v. *Overton* (1), *Lucas* v. *Brandreth* (2), and *Tatham* v. *Vernon* (3), where trusts

(1) 15 Beav. 480. (2) 28 Beav. 274. (3) 29 Beav. 604.

M. R. 1915. CROSS v. CROSS.

were declared in favour of the objects without any words of limitation, and where it was held that estates for life only were given. He points out that in none of these cases was there anything to show the intention beyond the simple terms of the limitation itself. And he thinks that they establish nothing more than this, that where there is a conveyance unto and to the use of a trustee and his heirs upon trust for A without more, no intention to confer the fee being expressed or otherwise appearing on the face of the instrument, A takes an equitable life estate and no more. He then cites *Pugh* v. *Drew* (1), where James V.-C. held that words of inheritance were not essential to the creation of equitable estates in fee, and expressed disapproval of the judgment of Chitty J., in *In re Whiston's Settlement* (2). He then gives the result he has arrived at in the following words :—"The result is that where an intention to confer more than a life estate is not expressed or sufficiently shown upon the face of the instrument, then, in a deed, a simple trust of real estate for A, without any mention of the heirs, does not give more than a life estate. No case, however, has been cited where such a limitation of a trust has not been held to confer the equitable fee where the intention to do so was expressed or sufficiently shown upon the face of the instrument. *Pugh* v. *Drew* (1) is a distinct authority that, in a deed, a limitation of a trust, the plain intention of which is to confer an equitable fee, can have that effect without the use of the word 'heirs.' I must follow that authority, and decide in accordance with Mr. Preston's statement of the law, and thus effectuate the intention which here, in my opinion, indisputably appears on the face of the instrument, that the children take absolute interests."

Therefore, according to Joyce J., the extent of the equitable estate conferred is not dependent upon the presence or absence of words of limitation, but on the intention of the instrument.

This decision was followed by Farwell J., in *In re Oliver's Settlement, Evered* v. *Leigh* (3); but the same learned judge, sitting in the Court of Appeal in *In re Thursby's Settlement* (4), when that

(1) 17 W. R. 988.
(2) [1894] 1 Ch. 661.
(3) [1905] 1 Ch. 191.
(4) [1910] 2 Ch. 188.

case was referred to, said that he never decided, and did not think, that an appointment of equitable interests in land to A, or to a class, without words of limitation, can carry more than a life interest to the appointee. He said: "It is not absolutely necessary to have the technical words as in the case of legal estates in land; but there must be circumstances such as Joyce J. found in *In re Tringham's Trusts* (1) and I found in *In re Oliver's Settlement* (2) sufficient to show an intention that the fee should pass."

There is, therefore, no uncertainty about the law as laid down by the English Courts. I would, however, consider myself bound by the judgments in *Meyler* v. *Meyler* (3) and *Bennett's Estate* (4) were it not that the English decisions have been recently followed in this country. In *In re Moses Houston, deceased, Rodgers* v. *Houston* (5) lands were conveyed to trustees in fee to hold in trust for three persons named, as tenants in common. The legal estate was vested in the trustees. Wylie J., being of opinion that the deed showed an intention to give the whole estate to the beneficiaries, held that they were entitled as tenants in common in fee of the equitable estate notwithstanding the absence of a limitation to the heirs. He refused to follow the *dictum* of the Vice-Chancellor in *Meyler* v. *Meyler* (3) that he was precluded from going into the question of intention, and he adopted the law as laid down in the English cases.

To the like effect is the judgment of Ross J., in *Stinson's Estate* (6).

I have therefore to determine in the present case whether the conveyance by Richard Cross sufficiently indicates an intention to dispose of the entire equitable estate in fee.

I think that the recital of the agreement to convey the lands, as held under the fee-farm grant, in trust for John Cole Bowen and his wife for their lives and the life of the survivor and then for the lives of Richard Cross and his wife, and the life of the survivor, and, subject to those life estates, for the children of Richard Cross and his wife as he should appoint, and in default

(1) [1904] 2 Ch. 487.
(2) [1905] 1 Ch. 191.
(3) 11 L. R. Ir. 522.
(4) [1898] 1 I. R. 185.
(5) [1909] 1 I. R. 319.
(6) [1910] 1 I. R. 47.

M. R. 1915.

CROSS v. CROSS.

of appointment, for the children equally, has no other meaning than that the whole fee-farm estate shall devolve upon the children subject to the life estates. There is the further circumstance that the lands were charged with £600 for the eldest son or his issue, which left a property of very small value for the two younger children. A life estate in a moiety of such a small property would be an illusory provision, and would not carry out the obvious intention to secure what it was possible to secure for the children of an impecunious and embarrassed father. On the whole deed I am convinced that it was the intention to dispose of the whole estate. Joyce J. said that it had been thought by some that if the Court had been astute to find an indication of a similar intention in the deed in *In re Whiston's Settlement* (1) it might have succeeded in doing so. I think that it only requires a very little astuteness to find it in the present case.

I will declare that the plaintiff and defendant took an equitable estate in fee-simple as tenants in common in equal shares in the lands settled by the deed, dated the 12th September, 1877, and that the costs be borne by the trust estate.

Solicitors for the plaintiff: *Thomas R. Wright & Son.*
Solicitor for the defendant: *Wynne & Wynne.*

A. H. W.

(1) [1894] 1 Ch. 661.

IN RE McCORMICK.
HAZLEWOOD *v.* FOOT.
(1915. No. 39.)

M. R.
1915.
April 26, 30.
June 17.

Settlement—Power—Appointment void for Remoteness—Election.

By a marriage settlement certain trust funds were settled upon trust for the husband and wife successively for life, and after their deaths for such of the issue of the marriage, whether children or remoter issue, at such time and in such shares as the husband and wife should jointly appoint, and in default as the survivor should appoint, and in default for all the children of the marriage who should attain twenty-one, or marry, in equal shares.

The husband, who survived his wife, by his will, reciting his power of appointment under the settlement, and that no appointment had been made thereunder, bequeathed both the property subject to the trusts of the settlement and other property of his own to trustees upon trust to pay the income to his daughter for her life without power of anticipation, and after her death he directed his trustees to hold both capital and income in trust for the children of his daughter as she should appoint, and in default of appointment for all her children equally, and he directed that his daughter should, within such time after his decease as his trustees and executors might think proper to appoint, elect in writing whether she would rely on her rights under the marriage settlement or take the benefits provided for her by his will, and in the event of her not electing to take the benefits provided for her by his will, he directed his trustees to hold the property upon certain trusts for the benefit of his son for life, and after his decease for his children. The daughter elected to take under the will.

Held, that inasmuch as, reading the provisions of the will into the settlement, the restraint on anticipation of the income of the settled fund appointed to the testator's daughter, and the trusts in favour of her children, infringed the rule against perpetuities, she was not bound to elect, and was not bound by the election made by her, and that she was entitled to an estate for her life in the whole fund settled by the settlement, free from the restraint on anticipation, and that on her death it went as in default of appointment between her and her brother, in equal shares.

ORIGINATING SUMMONS.

The following statement of facts is taken from the judgment of the Master of the Rolls:—

"By a settlement dated 26th April, 1882, executed on the

M. R. 1915.

HAZLEWOOD *v.* FOOT.

marriage of Edward Henry McCormick with Ina Cannon, a trust fund, consisting of a sum of £500, which is subject to the life estate therein of Susanna Cannon, the mother of the said Ina Cannon, still living, and a policy of assurance on the life of Edward Henry McCormick, now represented by the sum of £1134 4*s.* 2*d.* South Australian 3¾ per cent. Inscribed Stock, was settled upon trust for the said Edward Henry McCormick and Ina Cannon for their lives, and after their deaths for all or such one or more exclusively of the issue of the marriage, whether children or remoter issue, at such time, and in such shares if more than one, and with such gifts over for the benefit of such issue or some or one of them, and generally in such manner for the benefit of such issue or some or one of them as the said Edward Henry McCormick and Ina Cannon should by deed jointly appoint, and in default of such appointment as the survivor of them should by deed or will or codicil appoint, and in default of and subject to any such appointment in trust for all the children of the marriage who, being sons, should attain the age of twenty-one years, or, being daughters or a daughter should attain that age or marry under it, and if more than one in equal shares.

"There were two children of the marriage, viz., Henry Charles McCormick and Eileen Amy McCormick, now Eileen Amy Hazelwood, a married woman; both have attained the age of twenty-one years. Ina Cannon, otherwise McCormick, their mother, died on the 29th November, 1901. Edward Henry McCormick, their father, married a second time, and died on the 1st June, 1910. The joint power of appointment which was vested in the father and mother was not executed, nor was there any appointment by deed executed by the survivor.

"By his will, dated the 27th June, 1907, Edward Henry McCormick appointed Albert Revell Foot and Arthur James M'Cormick his trustees and executors, and after certain bequests for the benefit of his son, Henry Charles McCormick, and his widow, and, after reciting the settlement, he purported to bequeath and appoint all the property subject to the trusts of the settlement to his trustees and executors upon the trusts thereinafter declared, and he devised and bequeathed to them all the rest and residue of his property of every kind, and declared that his trustees and

executors should hold his residuary estate, and all the said property which was subject to the trusts of the marriage settlement, upon trust to pay the income thereof to his daughter, the said Eileen Amy McCormick, for her life, subject to a restraint on anticipation, and subject to a discretionary trust in favour of her and her children in the event of her attempting to alienate her life estate, and after her death he directed his trustees to hold the same and the income thereof in trust for such one or more exclusively of the other or others of her children as she should by deed or will appoint, and, in default of appointment, in trust for all the children in equal shares as therein mentioned, and, in default of children, in trust for such person or persons as she should by will or codicil appoint, and the testator directed his daughter, within such time after his decease as his trustees should think proper to appoint, to elect in writing whether she would rely on her rights under his marriage settlement or take the benefits provided for her by the will, and, in the event of his daughter not electing to take the benefits provided for her by his will, then he directed his trustees to hold the trust property upon the same trusts as were thereinbefore declared in respect of a sum of £2000 bequeathed in trust for the benefit of his son and his children.

"The residue of the testator's unsettled property amounted to in or about £3500, and the settled property consisted of the sum of £500 (subject to the life estate of his daughter's grandmother) and £1134 4*s.* 2*d.* South Australia 3¾ per cent. Stock.

"After the testator's death his trustees and executors called upon his daughter to elect whether she would rely on her rights under the marriage settlement or take the benefits provided for her by the will. She was told in effect that she was bound to elect, and, without any advice, she did elect to take under the will.

"She has since been advised that she was not bound to make any election, and is not bound by the election made by her."

Brunskill K.C., for the plaintiff, Miss Eileen Amy Hazlewood:—

Apart from the question of election, the appointment of the trust funds, contained in the will of Edward Henry McCormick, infringes the rule against perpetuities, for the restraint on antici-

M. R. 1915. HAZLEWOOD *v.* FOOT.

pation may subsist for a longer period than his life and twenty-one years after his death, therefore the plaintiff takes a life estate in the whole of the trust funds freed from the restraint on anticipation: *Fry* v. *Caffer* (1); *Whitby* v. *Mitchell* (2). The power of appointment amongst her children given to the plaintiff by the will is void, as being a delegation of the testator's power of appointment: *Williamson* v. *Farwell* (3); and the gift to her children in default of appointment infringes the rule against perpetuities.

If the appointment transgresses the rule against perpetuities, no case of election arises, for the Court will not put parties to their election in such a way as to transgress the rule: *In re Oliver's Settlement, Evered* v. *Leigh* (4); *In re Nash, Cook* v. *Frederick* (5); *In re Handcock's Trusts* (6). In any event, there is here no real election at all, for if the plaintiff elects against the will she forfeits both settled and free estate. For this reason the gift cannot be treated as a conditional legacy requiring the legatee either to settle the appointed property or to forfeit her interest in the free property bequeathed to her: *King* v. *King* (7); *King* v. *King* (8). Even if the will is construed in this way, the testator has not made any appointment to the plaintiff out of which she could satisfy his requirement.

The result is that under the will the plaintiff takes a life interest in the entire property free from the restraint on anticipation, and she takes one-half the *corpus* of the settled property in reversion, expectant on her own death, absolutely.

S. L. Brown K.C., for Albert Revell Foot and H. T. Cannon (the trustees of the settlement of the 26th April, 1882) and Albert Revell Foot and Arthur John McCormick (the trustees and executors of the will of Edward Henry McCormick):—

This is not a case of election at all; the confusion is due to the testator's use of the word "elect" in his will. In substance this is an absolute appointment to the plaintiff, followed by a

(1) Kay, 163.
(2) 42 Ch. D. 494.
(3) 35 Ch. D. 128.
(4) [1905] 1 Ch. 191.
(5) [1910] 1 Ch. 1.
(6) 23 L. R. Ir. 34.
(7) 13 L. R. Ir. 531.
(8) 15 Ir. Ch. R. 479.

re-settlement of the absolute interest given to her. The case differs from *King* v. *King* (1) and *King* v. *King* (2) merely in matter of form. This construction of the will is in accord with the obvious intention of the testator, while that contended for by the plaintiff is directly contrary to it.

M. R. 1915.

HAZLEWOOD v. FOOT.

E. S. Murphy, for Henry Charles McCormick :—

This is not an absolute appointment to the plaintiff. Whether she elects to take under the will or not, that cannot affect my client's rights under the settlement. The plaintiff has no power to appoint more than a moiety of the corpus of the settled funds.

Cur. adv. vult.

June 17.

O'CONNOR M.R., after stating the facts as above, continued :—

The decision of the Court of Appeal in this country in *Hancock's Trusts* (3), followed by the English Court in *Oliver's Settlement* (4) and *In re Nash* (5), clearly establishes that Mrs. Hazlewood was not bound to elect, and was entitled to assert her rights under the settlement, and also to take the benefits given to her by the will. This cannot be questioned, and suffice it to say that the principle underlying these cases is that the imposition of an obligation to elect in such a case as the present would afford a way for indirectly violating the rule against perpetuities.

I do not think that the fact that she did elect alters the situation. She was called on by the trustees of the will to elect, and without any advice she elected to take the benefits conferred on her by the will. She ought not in any case to be held bound by an election made under such circumstances. But, apart from the circumstances under which the election was made, she cannot be bound by it, because this would be setting up the gift which is void for perpetuity.

The doctrine of election is not applicable at all, for the reasons I have stated, and Mr. Brunskill pointed out that, even if it were, the testator's daughter could not by an election carry out the

(1) 13 L. R. I. 531.
(2) 15 I. Ch. R. 479.
(3) 23 L. R. Ir. 34.
(4) [1905] 1 Ch. 191
(5) [1910] 1 Ch. 1.

M. R. 1915.

HAZLEWOOD v. FOOT.

testator's intention, because she had only a life estate in the settled fund under the appointment, while the reversion goes in equal shares as in default of appointment between herself and her brother.

I will declare that Eileen Amy Hazlewood, otherwise McCormick, is entitled under the marriage settlement and the appointment made by the will to an estate for her life in the whole of the fund settled by the said settlement, without any restraint on anticipation, and that, subject to the said life estate, the settled fund goes as in default of appointment between Eileen Amy Hazlewood and her brother in equal shares.

Solicitors for the plaintiff: *I. Thornton & Son.*
Solicitors for the trustees: *Milward, Jones, & Cameron.*
Solicitors for Henry Charles McCormick: *Hoey & Denning.*

A. H. W.

IN RE THOMAS GREEN CARSON.

ROBERT HALDANE CARSON AND FRANK NUGENT GREER *v.* JANIE KNOX CARSON, ROBERT SELWOOD CARSON, AND IAN A. K. BURNETT.

M. R.
1914.
Nov. 17.
Dec. 9.

Will—Settlement—Bonus on Settled Shares—Tenant for life and Remainderman—Capital or Income.

A testator, by his will, settled shares in an American Railway Company. Some years after the testator's death the company, which had obtained the necessary powers to increase its capital, paid a bonus of 50 per cent. to its stockholders out of accumulated profits, the payment being made in the form of a 40 per cent. dividend payable in stock, and a 10 per cent. cash dividend.

Held, that the trustees of the will should deal with the 40 per cent. stock dividend as an accretion to the capital of the testator's estate, and with the 10 per cent. cash dividend as income arising from the estate.

ORIGINATING SUMMONS.

This was a summons issued by the plaintiffs, as executors and trustees of the will dated the 9th February, 1906, of Thomas G. Carson, formerly of Coleraine, deceased, for the determination of the questions: Whether (*a*) a 40 per cent. stock dividend; (*b*) arrears of dividend from 1st January, 1911, at 8 per cent. on said stock dividend; and (*c*) a cash dividend of 10 per cent., all issued or paid by the Northern Central Railway Company of Baltimore, U.S.A., to the plaintiffs as stockholders in the said company, as of record on 3rd August, 1914, ought to be regarded as an accretion to the capital of the trust funds bequeathed by the said will, or as income arising from such capital.

The testator by his will bequeathed all his property, both real and personal, to the plaintiffs and testator's wife, the defendant Mrs. J. K. Carson, whom he appointed as his executors and trustees upon certain trusts, under which the said Mrs. J. K. Carson and the defendant, Robert S. Carson, were interested as tenants for life, and the defendant, Ian A. K. Burnett, as a

M. R. 1914.

CARSON v. CARSON.

remainderman. The testator died on the 18th October, 1908, and his will was duly proved by the executors therein named.

The greater portion of the assets of the testator at the date of his death consisted of shares in the common stock of the Northern Central Railway Company of America, having its chief offices at Baltimore, Maryland, U.S.A.; and after the sale of certain of these shares by the executors, for the purposes of administration, there remained as portion of the testator's trust estate 2728 of the said shares. Dividends on the shares had for a number of years, both prior to and after the testator's death, been paid at the rate of 8 per cent.; and the company also had to its credit accumulations of income amounting to several million dollars. Early in the year 1911 the Pennsylvania Railway Company of America, who were large holders of stock of the Northern Central Railway Company, agreed with the directors of the latter company to take a lease of its entire undertaking for a term of 999 years at a high rental. This scheme was opposed by a minority of the shareholders, and lengthy litigation ensued in the American Courts, which terminated in favour of the directors of the Northern Central Railway Company, and the lease was accordingly confirmed.

On the 10th July, 1914, the following resolution was adopted at a meeting of the Board of Directors of the Northern Central Railway Company:—

"Whereas this Board, by resolutions adopted 14th July, 1910, and 11th October, 1910, approved an increase of the Capital Stock of the company, and the declaration, when the said increase had been duly authorized, of a dividend of 40 % payable in stock at par, and the action was subsequently ratified and approved by the stockholders of the company at a meeting duly convened and held on the 2nd November, 1910. And whereas the said proposed increase of stock has been duly approved by the Public Service Commission of Maryland, and has been submitted to, and is now under consideration by, the Public Service Commission of Pennsylvania; and if the approval of that Commission shall be had, the right to increase the stock in the manner, and to the extent proposed, will have been duly and legally perfected; therefore: Resolved, that a dividend of 40 % is hereby declared payable in stock at par to

the stockholders of the company of record on the 3rd day of August, 1914, but only in the event that prior thereto the proposed increase of the stock of the company shall have been approved by the Public Service Commission of Pennsylvania, and the right to make the said increase shall thus have been finally and fully perfected.

"Resolved, that a further dividend of 10 % is hereby declared payable in cash to the stockholders of the company of record on the 3rd day of August, 1914; and for the purpose of providing a fund for the payment of the said dividend the proper officers of the company are hereby authorized and directed to sell or otherwise dispose of such treasury assets or funds of the company as may be necessary; but this resolution shall be inoperative and void by such action if the Public Service Commission of Pennsylvania shall disapprove either the proposed increase of the stock of this company, or the proposed lease of its railroad, property, and franchises to the Pennsylvania Railroad Company."

The approval of the Public Service Commission of Pennsylvania to the increase of stock by the company was duly obtained, and on the 5th August, 1914, the treasurer of the Northern Central Railway Company wrote to the plaintiffs as follows:—

"The enclosed temporary certificates are in payment of a forty per cent. (40 %) stock dividend under resolution of the Board of Directors, adopted on July 10, 1914, to be paid to stockholders of record at the close of business on August 3, 1914. Definitive certificates of stock will be mailed on and after August 24, 1914, upon surrender at the office of the company, Calvert and Centre Streets, Baltimore, Md., of temporary certificates issued for whole shares. Checks will be mailed, August 24, 1914, in payment of the cash dividend of ten per cent. (10 %) to stockholders of record at the close of business on August 3, 1914, and also in payment of a dividend of eight per cent. (8 %) to stockholders of record at the close of business on August 3, 1914, including therein the forty per cent. (40 %) increase of stock issued as of that date. The latter dividend was declared in order to effect a distribution of the rental payable between January 1, 1911, to July 1, 1914, under the lease of the Northern Central Railway to the Pennsylvania Railroad Company,

M. R. 1914.

CARSON v. CARSON.

equivalent to twenty-eight per cent. (28 %) upon the increased stock of the company."

In pursuance of the said arrangement the plaintiffs received from the company temporary stock certificates in payment of the 40 per cent. stock dividend above mentioned; the usual dividend of 8 per cent. on their original shares; a like dividend of 8 per cent. from the 1st January, 1911, on the said 40 per cent. increase of stock, and a further cash dividend of 10 per cent. The present summons was then instituted.

Chadwick, for the plaintiffs.

W. E. Wylie K.C., for the defendant Mrs. J. K. Carson; *Serjeant Matheson K.C.*, for R. S. Carson.

Leech K.C., for I. A. K. Burnett.

The following authorities on the question, "capital or income," were cited and discussed:—*Bouch* v. *Sproule* (1); *Barton's Trust* (2); *In re Malam, Malam* v. *Hitchens* (3); *In re Alsbury, Sugden* v. *Alsbury* (4); *In re Hopkins' Trusts* (5); *Preston* v. *Melville* (6); *In re Piercy* (7); *Irving* v. *Houstoun* (8); *Paris* v. *Paris* (9); *In re Hodgens* (10); *In re Armitage* (11); and Lord Halsbury's Laws of England, vol. v, p. 279.

Cur. adv. vult.

O'CONNOR M.R.:—

The petitioners in this matter are Robert Haldane Carson and Frank Nugent Greer, trustees and executors of the will of Thomas Greer Carson, deceased. They have applied to the Court for the determination of a question which arises as between the tenants for life of their trust fund and those entitled in remainder.

The testator by his will, dated 9th February, 1906, devised

(1) 12 A. C. 385.
(2) L. R. 5 Eq. 238.
(3) [1894] 3 Ch. 578
(4) 45 Ch. D. 237.
(5) L. R. 18 Eq. 696.
(6) 16 Sim. 163.
(7) [1907] 1 Ch. 289.
(8) 4 Pat. Sc. App. 521.
(9) 10 Ves. 184.
(10) 11 Ir. Eq. R. 99.
(11) [1893] 3 Ch. 337.

and bequeathed all his real and personal estate to his trustees upon trust, after paying certain legacies, to keep the residue of his estate invested as thereinafter set forth, and out of the issues, interests, and profits thereof to retain for themselves the sum of £20 per annum each; and to pay to his wife, the defendant Janie Knox Carson, during her life, the sum of £1200 per annum, or a sum equal to half the yearly issues, interests, and profits, whichever should be found the largest at the end of the year; and subject to this provision for his wife, the testator directed his trustees to pay one-half of the interests, issues, and profits of his estate to and amongst the children of his late sister, Mrs. M'Master, and four-fifths of the other half to and amongst the children of his sister, Mrs. Burnett (of whom the defendant Ian A. K. Burnett is one); and as to the remaining one-fifth, to his nephew, the defendant Robert Selwood Carson, for his life, and after his decease to his issue in equal shares. He gave his trustees powers to invest in any investments at home or abroad at their discretion, whether by law authorized for trustees' investments or not, and he declared that it should be lawful for his trustees to create an overdraft or in any other way raise money to pay legacies, or for the purpose of taking up new shares that might be offered by the Northern Central, or any other railway company in which the estate might hold shares, to their shareholders or stockholders on what they should consider favourable terms.

The testator died on the 18th October, 1908, and his will, with two codicils which do not affect the questions at issue, was proved on the 16th December, 1908, by the plaintiffs.

The greater portion of the assets of the testator consisted of shares in the common stock of the Northern Central Railway Company of America, and after the sale of some of these shares for the purpose of paying legacies and expenses of administration, there remained as portion of the residuary trust estate 2728 shares in the company. For many years, both before and since the death of the testator, dividends were paid on these shares at the rate of £8 per cent. per annum, but larger dividends might have been paid, and the company had to its credit accumulated profits of a considerable amount.

M. R. 1914.

CARSON v. CARSON.

In the year 1911 the Northern Central Railway Company, acting within their powers, made a lease of the entire of their undertaking to the Pennsylvania Railway Company of America. This letting, I would say, rendered unnecessary the further retention of the accumulated profits; but, whether this was the reason or not, the company determined to distribute the accumulated profits among the shareholders in the following manner:—

The company first resolved upon an increase of the capital stock of the company. They then declared a dividend of 40 per cent. payable in stock at par to the stock-holders of the company of record on the 3rd August, 1914, and a further dividend of 10 per cent. payable in cash to the same stock-holders. This was followed by the issue of certificates of stock to the stock-holders of the amount of 40 per cent. of their holdings on the 3rd August, 1914, and by the payment to them of a cash dividend of 10 per cent., and a further cash dividend of 8 per cent. on the original stock and the additional 40 per cent. increase of stock. The capital stock of each shareholder was, therefore, increased by 40 per cent. Each shareholder further got an immediate payment of a dividend of £10 per cent. on his original holding, and £8 per cent. on his entire holding, including the 40 per cent. added stock.

The testator's widow, the defendant Janie Knox Carson, may be treated as tenant for life of a moiety of the fund, because one moiety of the income, if increased by the special dividend, would be much more than £1200 per annum. She claims that the 40 per cent. stock dividend and the 10 per cent. cash dividend should be treated as income, and that one moiety thereof should be paid to her as tenant for life; while the defendant Ian K. Burnett, who is entitled to a share in the corpus of the fund, claims that at least the 40 per cent. stock dividend should be treated as capital.

Before dealing with the legal principles applicable to the question, I must first determine what was the intention of the company, and what were its powers. It seems to me to be absolutely clear that it was intended to increase the capital stock of each shareholder to the extent of 40 per cent. This is

established by the terms of the company's resolution, and if anything further were necessary to confirm this it is the payment of £8 per cent. dividend on the increase. Further, it is not denied that the company had power to increase its capital.

On these facts, what is the law applicable to the case? There is no difficulty in ascertaining this, so far as the 40 per cent. stock dividend is concerned. The general principle was affirmed by Lord Herschell in the House of Lords in *Bouch* v. *Sproule* (1). At p. 397 he adopts the language of Fry L.J. in the Court of Appeal, who said:—"When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital."

Now, in the present case, the 40 per cent. stock dividend was clearly and expressly appropriated as capital, and contemporaneously with that appropriation a dividend of 8 per cent. was paid upon it. I have, therefore, no difficulty in holding that this stock dividend must be held by the trustees as capital, and that the tenant for life is only entitled to the dividends declared and to be declared on it.

The question raised in connexion with the 10 per cent. dividend is not to be disposed of so easily. No doubt that sum was paid as a dividend, *eo nomine*, but it is to be observed that the source of payment was exactly the same as that which satisfied the issue of the 40 per cent. increased capital. The inference seems a fair one, that if the latter is to be treated as capital, so also ought to be the former. Moreover, the resolution directing the payment of the 10 per cent. dividend directs the officers of the company to sell or otherwise dispose of such treasury assets or

(1) 12 A. C. 385.

M. R. 1914.

CARSON v. CARSON.

funds of the company as may be necessary. It does not limit the funds out of which the payment is to be made to accumulated profits, although what represented accumulated profits were in fact sufficient for the payment.

I do not think that Lord Justice Fry, in using the term "dividend," when enunciating the principle he laid down, employed it in the wide sense which would include a dividend on a capital sum, but in the sense of a dividend on the profit or interest on capital. It is not enough to point to the resolution and say it was paid expressly as dividend, and therefore it must be treated as income. In order to do so it must be established that the dividend was in fact paid on the profits or interest of capital, and not on capital itself.

This brings us to the consideration, whether a payment out of the accumulation of profits of previous years must not be taken to be a payment out of or on account of capital.

In a series of cases, of which *Irving* v. *Houstoun* (1) is the most important, payments out of accumulated profits were treated as payments on account of capital to which the tenant for life was not entitled. But these were cases in which the companies had no power to increase their capitals, but had accumulated profits, and in fact used them for capital purposes, and afterwards distributed them amongst the proprietors. *Irving* v. *Houstoun* (1) was a case of the Bank of Scotland; *Brander* v. *Brander* (2) was a case of the Bank of England; and *Ex parte Hodgens*, *In re Hodgens* (3) was a case of the Bank of Ireland. None of these institutions had power to increase its capital, but had in fact used accumulated profits as capital. Lord Herschell, after dealing with these authorities in *Bouch* v. *Sproule* (4), said:—"I think, therefore, that *Irving* v. *Houstoun* (1) must still be regarded as good law, unaffected by any counter-current of authority. But it is, in my opinion, an authority governing only a case similar in its facts; that is to say, a case where the company has no power to increase its capital, but has accumulated profits and used them in fact for capital purposes, and afterwards distributes these

(1) 4 Paton Sc. App. 521.
(2) 4 Ves. 800.
(3) 11 Ir. Eq. R. 99.
(4) 12 A. C. 385, at p. 397.

profits amongst the proprietors. I think it will be seen that there is a substantial reason for the limitation I have suggested." And, subsequently, after quoting the principle laid down by Fry L.J., and adopting it, he goes on to say:—"And it appears to me that where a company has power to increase its capital, and to appropriate its profits to such increase, it cannot be considered as having intended to convert, or having converted, any part of its profits into capital when it has made no such increase, even if a company having no power to increase its capital may be regarded as having thus converted profits into capital by the accumulation and use of them as such." In other words, the mere accumulation of profits is no evidence of intention on the part of a company to change their character by turning the accumulations into capital; and when a company with power to increase its capital does not do so, even though it has a ready means in the shape of an accumulated fund, it is an indication that there was no intention to change the character of the fund. Mere accumulation of profits does not make them any the less profits. Profits are very often reserved for the purpose of equalizing dividends.

Now, turning to the case I am dealing with, I find a company with power to increase its capital accumulating its profits. We then find it by resolution expressly dedicating portion of its accumulated fund, equivalent to 40 per cent. on the existing capital, to increasing the capital, and authorizing the payment of a cash dividend equivalent to 10 per cent. on the existing capital, but without stating whether it was to be a payment on account of capital or income. I think that it is a fair inference that whereas the 40 per cent. was expressly dedicated to a capital purpose, and there was no declaration as to the purpose of the 10 per cent. beyond that it was a dividend, it was not intended to convert the latter into capital. It was to retain the character of the fund out of which the payment was to be made. This was accumulated profits which the company, acting within its powers, converted into additional capital to the extent of 40 per cent., leaving the balance unconverted. The case seems to me to come within the principle enunciated by Lord Herschell,

M. R. 1914.

CARSON. v. CARSON.

and I must hold that the 10 per cent. dividend was paid as income, to which the tenant for life is entitled.

Solicitors for the plaintiffs: *Dickie & Carson.*
Solicitor for Mrs. J. K. Carson: *John. F Dickie.*
Solicitor for R. S. Carson: *Robert S. Heron.*
Solicitor for I. A. K. Burnett: *D. B. Gilmore.*

W. L.

Appeal. 1915. May 14, 18.

IN THE MATTER OF THE ESTATE OF BLANCHE HENRIETTA TOPPIN (1).

Extinguishment of Charge on Inheritance—Estate for Life and Ultimate Remainder in Fee—Interposed Contingent Remainder in favour of Issue—Possibility of Issue Extinct—Merger.

Lands were limited by will to A. for life, with remainder to her issue as she should appoint, with remainder as she should appoint generally, with an ultimate remainder to A. in fee. On the testator's death A. also became absolutely entitled to a charge on the lands. A. died a spinster aged over seventy years, having by her will devised her real estate and bequeathed her personal estate to different persons, without mention of the charge, and without having indicated any intention during her life either to keep the charge subsisting or to extinguish it.

Held, by the Court of Appeal (affirming the decision of Ross J.), that A. had, at the date of her death, such an estate in the lands as to admit of the making of the presumption that the charge had become extinguished, and that, as it was a matter of indifference to her during her life whether the charge was kept subsisting or not, the presumption of extinguishment should be made.

This was an appeal by the executors of Miss Augusta Magan from a decision of Ross J., dated the 19th March, 1915 (reported *ante*, p. 198, where the facts are stated), holding that a charge of £3333, late Irish currency, created by a settlement dated the 27th August, 1835, and thereby charged upon the lands sold in this matter, had become extinguished.

(1) Before O'BRIEN L.C., CHERRY L.C.J., and RONAN L.J.

Serjeant Matheson K.C. and *Brunskill K.C.* (with them *Herbert Jones*), for the appellants :—

We contend that Ross J. was wrong in holding that the charge of £3333 had become extinguished. There is no evidence of express intention that merger should take place, and no such intention can be implied. The principle is thus stated by Sir W. Page Wood V.-C. in *Richards* v. *Richards* (1). "The rule as to this is, that, where it would be more beneficial to the person entitled to the land and the charge to keep the charge on foot, there the Court will raise an implication that he intended that the merger should not take effect, and that the charge should be raised." "Unless you can show that a period existed in which it was absolutely indifferent to the owner whether the charge was kept subsisting or not, there shall be no merger": *Forbes* v. *Moffatt* (2); see also *Bury's Estate* (3), *Bayly's Estate* (4). Here, so far from it being a matter of indifference to Miss Magan, it was clearly to her advantage that the early charge should have been kept alive, as a protection to her as owner of the lands against intervening incumbrances, and any lawyer would have so advised her. Therefore, the true presumption is against the extinguishment of the charge: *Liquidation Estates Purchase Co.* v. *Willoughby* (5). We further say that Miss Magan up to the moment of her death had no such estate in the lands as to allow of merger. She was never owner in fee, but remained tenant for life under her mother's will until her death. The possibility of her having issue continued in the eyes of the law notwithstanding her age: Co. Litt. 40a; *Jee* v. *Audley* (6); *In Re Hocking, Michell* v. *Loe* (7). Consequently the remainder to her issue, as she might appoint, cannot be treated as having become determined, but was a subsisting estate intervening between her life estate and the remainder in fee. "A person who has a limited interest, consisting of an estate for life, and of a remainder or reversion in fee, subject to interposed estates in other persons, will be considered only as a tenant for life with reference

(1) 1 Johns. 754, at p. 766.
(2) 18 Ves. 384.
(3) [1898] 1 I. R. 379.
(4) [1898] 1 I. R. 383.
(5) [1898] A. C. 321.
(6) 1 Cox, 324.
(7) [1898] 2 Ch. 567.

Appeal. 1915. *In re* TOPPIN'S ESTATE.

to the charge, so that prima facie there will be no merger by his becoming owner of a charge on the estate": Tudor's Leading Cases on Real Property, 4th ed., p. 254. In order that merger should take place the two estates must be so connected that the latter is immediately expectant on the former, "so as to come into its place on the determination of that estate": Preston, Convey., vol. iii, pp. 108, 572. The possibility of the temporary union of estates recognized in *Lemon* v. *Mark* (1) has no application in such a case as this. Was there to be a temporary merger of the charge? We rely on *Donisthorpe* v. *Porter* (2), and *Wyndham* v. *Earl of Egremont* (3). When did the merger take place? Not on the death of the mother, when Miss Magan became entitled to the charge, as she might then have married and had issue. There is evidence before this court, which was not before Ross J., that Miss Magan herself sold portions of the lands in her capacity as tenant for life, and not as absolute owner, and that trustees for the purposes of the Settled Land Acts were appointed with a view to such sales in the years 1886 and 1893. She therefore regarded herself solely as tenant for life. We further rely on the judgment of the King's Bench Division in *In Re Magan* (4). There the question arose as to whether, in ascertaining the Estate Duty payable on the death of Miss Magan, the property subject to the general power of appointment contained in the will of her mother was, under section 4 of the Finance Act, 1894, to be aggregated with the individual property of Miss Magan, the answer to this depending upon whether at the death of the latter the property subject to the power was or was not settled property under the will of the mother, and whether, if so, it passed by that will. The King's Bench Division there held that the property, although passing as unsettled property after her death, remained settled property within the meaning of the Finance Act up to the moment of her death, which preceded in point of time the passing of the property, as the law contemplated the possibility of her having issue as long as she remained alive, notwithstanding her age; and such issue, had there been any, would have taken under

(1) [1899] 1 I. R. 416.
(2) 2 Eden, 162.
(3) Ambler, 753.
(4) Unreported.

the will of her mother. *Browne* v. *Warnock* (1), cited by Ross J., was a case of vendor and purchaser, and a purchaser is bound to be satisfied with a moral certainty against the happening of a contingency. In such a case as this a mathematical certainty must be established.

Gerald FitzGibbon K.C., and *Charles Murphy*, for the respondent :—

It was a matter of complete indifference to Miss Magan whether or not the charge was kept alive, there being no substantial incumbrance intervening between the life estate and the remainder in fee. The estate was, moreover, a perfectly solvent one. That being so, the presumption is that the charge became extinguished : *Forbes* v. *Moffatt* (2). To hold otherwise would be "to burthen the estate to no purpose" : *Donisthorpe* v. *Porter* (3). As to the estate in the lands of Miss Magan, she was in effect an owner in fee for many years prior to her death, owing to the impossibility of her having issue. She could have sold as absolute owner, and the title would have been forced upon an unwilling purchaser : *Browne* v. *Warnock* (1).

As to her position after possibility of issue extinct, we also rely upon *Persse* v. *Mitchell* (4) ; *In re Lowman* (5) ; *In re White* (6), and *Thornhill* v. *Nixon* (7). In *In re Hocking* (8), relied upon by the appellants, the Court refused to make the presumption of a woman being past the age of child-bearing, solely on the ground that to do so would deprive a living person of a possible interest. Here no living person save Miss Magan had any possible interest in the lands, nor could such a person, save one claiming through her, have come into existence.

Even if Miss Magan could not be regarded as an absolute owner in fee, her position was at least as strong as, and was analogous to, that of a tenant in tail who had not barred the entail, and it is well settled that, although the act of a tenant for

(1) 7 L. R. Ir. 3.
(2) 18 Ves. 390.
(3) 2 Eden. 162.
(4) 34 I. L. T. R. 135.
(5) [1895] 2 Ch. 348.
(6) [1901] 1 Ch. 570.
(7) [1904] W. N. 112.
(8) [1898] 2 Ch. 567.

Appeal. 1915. *In re* TOPPIN'S ESTATE.

life who acquires a charge on the settled lands will prima facie make him a creditor, it is otherwise in the case of a tenant in tail, even where he acquires the charge by his own act, and not by the operation of a will or settlement: *Shrewsbury* v. *Shrewsbury* (1); *Jones* v. *Morgan* (2); *Wigsell* v. *Wigsell* (3); *Horton* v. *Smith* (4); *Keogh* v. *Keogh* (5). The reason for that distinction being made in the case of a tenant in tail is that he can bar the entail, and by his own voluntary act acquire the absolute estate in the lands. Here Miss Magan had at least "a qualified seisin of the inheritance," entitling her "to all the remedies and privileges of the owner of an immediate estate of inheritance as distinguished from the tenant of the mere freehold, having a particular estate" (Preston, Con., vol. iii, p. 377), and that estate of inheritance could only have been defeated by her own voluntary act of marrying and having issue. The proposition contended for by the appellants is too wide. See Preston, Con., vol. iii, p. 108, "In estates of freehold there will be a species of merger, or rather of union, notwithstanding the interposition of an estate for years, and in some cases notwithstanding a mesne contingent remainder"; . . . "and even while the intervening remainder is in contingency, the several estates belonging to the same person will unite for all the purposes of tenure, and there will be a temporary merger, subject to the right of those entitled under the contingent remainder, to have the benefit of that remainder when it can vest. In this instance, the estate opens and closes as the circumstances of the contingent remainder require": *Ib.*, p. 113. See also p. 116, and *Lemon* v. *Mark* (6).

The presumption of intention must be considered to have arisen on the death of Miss Magan: *Swinfen* v. *Swinfen* (7). That she exercised the powers of a tenant for life is immaterial. That was a convenient method of making title, and she was entitled to make use of it, notwithstanding the merger of her life estate: *In re Marshall's Settlement* (8). The King's Bench Division, in

(1) 1 Ves. Jun., 226.
(2) 1 Br. C. C. 205.
(3) 2 S. & S. 364.
(4) 4 K. & J. 624.
(5) I. R. 8 Eq. 179.
(6) [1899] 1 I. R. 416.
(7) 29 Beav. 199, at 204.
(8) [1905] 2 Ch. 325.

In re Magan (1), did not hold that Miss Magan remained solely a tenant for life until her death, but that the property remained settled property. They further held that the moment after her death the entire estate in the lands passed as unsettled property, which is in our favour. The fact that Miss Magan devised the lands without mention of the charge affords some evidence in favour of the extinguishment: *Grice* v. *Shaw* (2); *Swinfen* v. *Swinfen* (3).

Serjeant Matheson K.C., in reply.

O'BRIEN L.C.:—

Although this is a case of some difficulty, it has been so fully and ably argued that we do not consider it necessary to reserve our judgment.

I shall advert very briefly to the facts. Mrs. Elizabeth Magan, being possessed of considerable real and personal estate, made her will on the 30th April, 1850, in the following terms:—[His Lordship referred to the will and continued:]

Mrs. Elizabeth Magan died on the 12th September, 1880, when her daughter Augusta Magan became entitled to whatever estate was devised and bequeathed to her by the will of her mother, and also became absolutely entitled under the provisions of a post-nuptial settlement of the 27th August, 1835, which it is unnecessary to consider in detail, to a charge of £3333 late Irish currency on the freehold property devised by the will. The title to this charge accrued and became a vested interest when she attained the age of twenty-one years, but she was not entitled to the beneficial ownership of the charge until the death of her mother, who had a life interest therein—a fact I mention because it was relied upon in the argument of Serjeant Matheson.

Miss Magan never married; at the date of her mother's death there could have been no presumption against her marrying and having children, but she attained the age of over seventy years, and it is not too much to say that the idea of her having children

(1) Unreported.
(2) 10 Hare, 76.
(3) 29 Beav. 199.

Appeal. 1915. *In re* TOPPIN'S ESTATE. O'Brien L.C.

at that age, or at any time during a period of many years before her death, was one not to be seriously entertained. I say that, fully appreciating the views which appealed to the earlier exponents of our law as to the devolution of real property after possibility of issue extinct—views which I do not find to be followed in the application of modern principles of equity to cases where the Court has to deal with mere charges on land, or with personal property, as distinct from the ownership of real property.

Miss Magan made her will on the 15th January, 1881, and died on the 26th October, 1905, aged, as I have said, over seventy years. By her will she devised to the person or persons who should be her heir or heiress-at-law at her death all her real freehold and chattel real estate, except certain premises in Delgany (which were not affected by the charge of £3333), and after leaving certain legacies she bequeathed the residue of her personal estate to the trustees and executors of her will for the purpose of building or of assisting in building hospitals.

On the one hand, those interested in the personal estate, the charities, now claim that this charge of £3333 has, by operation of law, remained during these many long years in full force and effect, that it formed portion of the personal estate of the testatrix at her death, and should be now raised as such; on the other, the co-heiresses-at-law of this lady claim that this charge must be considered in law as having absolutely disappeared and become extinguished in the freehold of the estate on, or prior to, her death; and that accordingly the legatees of her personal estate cannot sustain the claim which they have put forward.

Ross J., in a short judgment, has said that the test in such cases is, "whether a period existed when it was absolutely indifferent to the owner of the lands charged and the charge whether it was kept subsisting or not"; and, notwithstanding the long and learned discussion which we have had, extending into many bye-ways both of feudal and equitable law, I have come to the conclusion that that test is the one which must be applied, that it is the test which in common sense ought to be applied, and the one which a proper consideration of the authorities coerces me to apply. It would not, however, be right that I should simply affirm, without more, that view of Ross J., as the authorities which

have been cited by Serjeant Matheson and Mr. Brunskill require careful and full consideration.

Serjeant Matheson has contended with great erudition that on the true construction of this will, and having regard to the decision of the Lord Chief Baron on the questions as to whether or not this estate was a settled estate at the date of Miss Magan's death, and whether she remained for some purposes a tenant for life, we ought to hold that, although prior to her death any possibility of her having issue might have disappeared, yet still, until the day of her death, the estate for life given in the first instance never coalesced with the estate in fee following it, owing to the existence of this contingency, which for many years prior to her death was an absolutely shadowy and unreal contingency, namely, the possibility of her having issue; and he says that as the remainder in fee never was in this lady up to the time of her death, there could be no extinguishment of the charge. Now, at the beginning of the argument, this contention struck me as being not only interesting, but as one which might possibly be right; I do not now, however, entertain any doubt but that it is untenable. Serjeant Matheson has relied upon *Donisthorpe* v. *Porter* (1), but that case, to which I shall refer later on in my judgment, is not, I consider, in favour of his contention.

Now, as regards charges on estates, it is clear that in feudal law these were not regarded with favour; the estate in the lands, and that alone, was the thing beloved of the feudal lawyer; charges upon land were of comparatively modern growth, and the condition of things which exists in our times, when charges upon an estate may be of greater value than the ownership of the estate itself, would not have at all commended itself to the early English lawyer. Accordingly we find that this question of the preservation or non-preservation of charges, so far from being dependent upon any principles of common law, is dependent upon the principles laid down by courts of equity; and equity has approached the problem of the destruction of charges, as distinct from the merger of estates, from its own peculiar point of view, and has framed rules to aid the Court in arriving at the con-

(1) 2 Eden, 162.

Appeal. 1915. *In re* TOPPIN'S ESTATE. O'Brien L.C.

clusion as to whether or not, under all the circumstances of each particular case, there has or has not been a destruction of any charge in question. One of the earliest cases in which the view of a court of equity in dealing with this question of extinguishment of charges is contrasted with the technical principles underlying the merger of estates based on common law doctrines with regard to real property, is to be found in a clear and concise passage in the judgment of the Master of the Rolls in *Forbes* v. *Moffatt* (1)—a passage which, so far from being in any way differed from, has re-appeared in successive judgments in later cases as containing a clear and binding statement of the law relating to this question of the destruction of charges, as viewed by courts of equity. "It is," the Master of the Rolls says, "very clear that a person becoming entitled to an estate, subject to a charge for his own benefit, may, if he chooses, at once take the estate, and keep up the charge. Upon this subject a Court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist at law; and sometimes preserve it, where at law it would be merged. The question turns upon the intention, actual or presumed, of the person in whom the interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate; and, where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot." Later on in the judgment of the Master of the Rolls we find another reference to this principle:—"In *Wyndham* v. *The Earl of Egremont* (2) the limitation was to Lord Thomond for life, with remainder to trustees to preserve contingent remainders, to his first and other sons in tail male, and to his right heirs. Yet it was determined that the charge should be raised for the benefit of his personal representatives. What the counsel for the personal representatives contended was, that the charge should not merge; unless at some period in Lord Thomond's life it was indifferent to him whether the term should be kept on foot or not. Upon looking into all the cases in which charges have been held to merge, I find nothing which shows that it was not perfectly

(1) 18 Ves. 390. (2) Ambler, 753.

indifferent to the party in whom the interests had united, whether the charge should or should not subsist; and in that case I have already said it sinks."

That is the view which has been followed from time to time by all the judges who have had to consider cases involving this question. It is necessary to find whether or not it was a matter of indifference to the person entitled to the charge that it should be kept on foot; if it was a matter of indifference, the presumption is that the charge was destroyed. I studiously avoid the words "merge" and "merger," because I find that all the judges in the early cases dealing with the extinguishment of charges are careful to point out that the technical question of merger at law is not the question which courts of equity take into consideration in dealing with charges. It is not a question of equity following the law, because this whole matter of keeping charges alive arose from the equitable view of the need to prevent injustice being done, and equity proceeded, not upon highly refined technicalities, but upon a broad basis of common sense. I do not intend to express any opinion as to whether, as regards the devolution of estate, this lady was at the date of her death seised of an estate in fee in which her former life estate had merged owing to the possibility of her having issue being at an end. I consider it unnecessary to decide that question, although we have listened to a learned argument from both sides in reference to it. I am clearly of opinion that equity in this matter looks only to the intention of the owner of the charge, and I shall now advert to some of the rules which have guided courts of equity in disposing of particular cases which have come before them.

In *Donisthorpe* v. *Porter* (1) the Lord Chancellor says:—"I do not think it a rule, that a charge upon an estate which can only be got at by trustees, and so be prevented from merging at law, shall be distinct in equity, and go to the administrator, while the estate goes to the heir; but, I think, where the owner has an absolute interest in the estate and charge, the charge is annihilated for the benefit of the estate and heir. The Court does not consider the subtilties of mergers, but discharges the estate from

(1) 2 Eden, 162.

Appeal. 1915.

In re Toppin's Estate.

O'Brien L.C.

the incumbrance; it would otherwise burthen estates to no purpose."

That judgment, delivered in 1762, is as applicable to the question now being considered in 1915 as if it had been delivered yesterday. To burden the estate with this charge for the benefit of the charitable legatees would be, in my judgment, to no purpose. Consider the position of this lady. At the time of her death the contingent estate devised to her issue had no reality whatsoever. She reached old age, and for many years had enjoyed the property without interest being paid on the charge, or any account being kept of such interest. It is inconceivable that she herself ever considered this charge, if she knew of it, as a property subsisting apart from her estate in the lands. Her will shows that she intended to deal with her property on two broad lines: she wished that her real estate should go to her co-heiresses; and that her personal estate should go to these charitable objects. She never intended that the charge on her real estate should be preserved and subsequently raised for the benefit of those who were to take her personal estate. Her position for many years prior to her death was that she could have sold this real estate and, at least under an order of a court of equity, have put the proceeds of the sale in her own pocket, notwithstanding this shadowy contingency relied upon by the appellants. What is the law with reference to a position such as that?

I shall refer first to the decision of the Court of Appeal in England in *Thornhill* v. *Nixon* (1). There the Court was asked to make an order for payment out of Court to a mother and her children of certain stock representing a trust fund which had been bequeathed by will upon trust for the mother for her life, and upon her death upon trust for her children on attaining age. The mother was a widow upwards of 52 years of age, and had five children, all of whom had attained 21 years of age. The learned judge in the Court below, Buckley J., refused to make the order sought, but on appeal Vaughan Williams L.J. is reported to have said, that while he did not mean to alter any rule which had been laid down, nor did he wish to be understood

(1) [1904] W. N. 112.

as saying that the mere fact that the mother had arrived at the age of 52 was in itself a sufficient reason for making the order, yet the Court had always to look at the circumstances of each case; and, having regard to the circumstances, and bearing in mind that it was a case in which the Court was not interfering with the rights of any living person, he thought it safe to make the order. That was an order based on the impossibility of the lady having further issue, and on the fact that the rights of no living person were interfered with. Whether or not this question of the interference with rights of living persons was originally a mere technicality or not, it is clearly settled that it is one of the circumstances of the case which must be taken into consideration.

In *In re Hocking* (1) the Court of Appeal in England refused to make the presumption of a woman being past child-bearing for the purpose of depriving a living person of the possibility of becoming entitled to an interest; and Lindley M.R., after referring to *In re Lowman* (2), says :—" There the Court deprived no living person of a possible interest. Nor, so far as I am aware, has it ever done so . . . I have looked in vain for any case in which the Court has deprived one person of the chance of becoming entitled to property if another should die childless or have a child. Nor ought the Court to do so." Again, in *In re White* (3), where leaseholds were bequeathed upon trust for a woman for her life, and after her death upon trust for all her children who should live to attain the age of 21 years, Buckley J. made the presumption in favour of the one child born of the woman who attained 21, the mother being a widow aged over 56 years, the learned judge in his judgment saying :—" In giving the whole to him, the Court is not depriving any living person of a possible interest." That is a perfectly clear and well-settled rule, and the decisions in Ireland are to the same effect.

In *Browne* v. *Warnock* (4) Chatterton V.-C. held that a title the validity of which depended upon the presumption that a woman of 63 was past child-bearing should be forced upon an unwilling purchaser, and that the purchase-money should go to the person who, in all good sense, was entitled thereto.

(1) [1898] 2 Ch. 567.
(2) [1895] 2 Ch. 348.
(3) [1901] 1 Ch. 570.
(4) 7 L. R. Ir. 3.

Appeal. 1915.

In re TOPPIN'S ESTATE.

O'Brien L.C.

A still stronger decision, having regard to the age of the woman, was that of Porter M.R. in *Persse* v. *Mitchell* (1), where he held that there was a presumption that there would be no issue of the marriage, the wife being almost 55 years of age, and having lived with her husband for over nineteen years without having a child; and he empowered the trustees to convey trust property to the plaintiffs, who on this presumption were entitled thereto, subject, however, to their entering into a recognizance to restore the estate in the event of there being issue, and the issue being entitled under the trusts of the settlement. That form of order, however, requiring a recognizance to be entered into, was really somewhat of a departure from our modern practice, and the case is not a clear authority on the general principle.

We were pressed by Serjeant Matheson as to the point of time when the charge can be said to have ceased to exist, but I find clear authority as to this, if authority be required, in *Swinfen* v. *Swinfen* (2). Sir J. Romilly M.R. there says: "The next question is, at what time this presumption of intention must be considered to arise. I am of opinion that the presumption arises on the death of the person who is entitled both to the estate and to the charge, and that this intention is to be collected from all the circumstances which existed at that period. All the acts of the person so entitled prior to his decease must be taken into account for the purpose of ascertaining his expressed intention, if any such exist, and all the facts affecting his position, down to and at the time of his decease, must also be taken into consideration, for the purpose of ascertaining from thence the intention of the testator, to be presumed from the position in which he stood."

The first leading fact then in considering this lady's position is that, as I have said, she could have converted the whole estate into money for her own benefit; the second is that she by her will devised her real estate, without mention of the charges, in one way, and bequeathed her personal estate in another. I consider it clear that I am entitled to take the first fact into consideration, and that I can do so with regard to the second is shown by a further passage in the judgment in *Swinfen* v. *Swinfen* (2), to

(1) 34 I. L. T. R. 135. (2) 29 Beav. 199, at p. 204.

which I have already referred:—"In this case, as far as there is any expression of intention, it is in favour of the merger, for the will devises the estate without any mention of the charge, which seems, by the Lord Justice Turner, in that case (1) to have been considered, in the absence of any other circumstances taking away the effect of that act, to constitute some, although a slight, intention to merge the charge."

I am also entitled to take into consideration the fact that this charge became vested in Miss Magan, not through any act of her own, but by reason of the limitations contained in the settlement of 1835.

It is well settled that when a person having a limited interest in lands, such as a tenant in tail in remainder, himself pays off a charge on those lands, the presumption is that he did so, not with the intention of benefiting the estate, but with that of keeping the charge alive. The presumption is otherwise in the case of a tenant in tail in possession, but that is, I take it, because he has the power at any time of barring the entail. That presumption, however, which arises from the fact that the charge was acquired by the man's own act, has no application in the case where both the charge and the estate in the lands coalesce in the same individual, not by force of any act of his own, but owing to the operation of some will or settlement; and in such cases, in the absence of any evidence of intention to the contrary, the charge is held to disappear. If that be the presumption to be drawn in the case of a tenant in tail even in the extreme case of the charge being acquired by an act of his own, merely by reason of the fact that he could at any time bar the entail, why should any different presumption be applied in a case such as this, where, as I have said, this lady could at any time during a period of many years prior to her death, either by means of an application to the Court, or by entering into a contract for sale, have turned the entire estate into money, for her own exclusive benefit?

Taking all these circumstances into consideration, and being of opinion that it was a matter of the most complete indifference to the owner whether this charge was kept alive or not, I must hold that

(1) *Grice* v. *Shaw*, 10 Hare, 76.

Appeal. 1915.

In re TOPPIN'S ESTATE.

O'Brien L.C.

the charge ceased to exist, and, applying *Swinfen* v. *Swinfen* (1), that the date when it so ceased to exist was that of the death of this lady.

An argument was addressed to us based on the fact that Miss Magan sold portion of the lands comprised in the settlement as tenant for life and not as absolute owner. That she was advised to do so is, however, readily to be understood by anyone who appreciates the convenient method of making title afforded by the powers conferred by the Settled Land Acts. In *In re Marshall's Settlement* (2)—a decision which I have never known to have been doubted—the powers of a tenant for life were held to be rightly exercisable, even although, in one point of view, there was no life tenancy in existence. The fact of Miss Magan having exercised the powers of sale of a tenant for life cannot for a moment outweigh the other considerations to which I have referred.

The appeal must be dismissed with costs.

Cherry L.C.J., and Ronan L.J., concurred.

Solicitors for the Appellants: *Browne & Maunsell.*
Solicitors for the Respondent: *T. T. Mecredy & Son.*

R. ST. J. C.

(1) 29 Beav. 199.

(2) [1905] 2 Ch. 325.

COX *v.* DUBLIN CITY DISTILLERY (No. 2).

(1905. No. 125.)

Barton J.
1914.
Dec. 17.
1915.
Feb. 17, 24.
Appeal.
June 18, 21, 22, 28.

Company—Debentures—Quorum of Directors—Resolution to issue Debentures—Interested Directors voting—Validity of Debentures issued to Directors—Validity of Debentures issued to Outsiders without notice of Irregularity—Right of Holder of invalid Debenture to rely on Trust Deed securing Debentures—Estoppel—Res Judicata—*Test Action.*

By a deed executed in 1895 property of a company was conveyed to trustees for the holders of second debentures to be thereafter issued. The articles of association of the Company provided that no director should vote in respect of any matter in which he was individually interested. They fixed the quorum of directors at two.

At a meeting of directors held on the 12th May, 1903, at which three directors (two of them being D. and K.) were present, it was resolved that certain second debentures should be issued in trust for D. and K. as security for advances made by them to the company, which debentures were subsequently issued.

Held, by the Court of Appeal, affirming the decision of Barton J., that as D. and K. were interested parties, there was no quorum competent to vote on the resolution, and the resolution was invalid.

In re Greymouth Point Elizabeth Railway and Coal Company, Limited; Yuill v. *Greymouth Point Elizabeth Railway and Coal Company, Limited*, [1904] 1 Ch. 32, followed.

At a meeting of directors, held on the 16th May, 1903, at which five directors (including C. and T.) were present, each of the directors present agreed to advance a certain sum to provide new plant, and it was resolved to issue certain second debentures in trust for those making such advances, as security for the same. At a meeting of directors held on the 25th June, 1903, at which C. and T. were not present, these debentures were issued.

Held, by the Court of Appeal, affirming the decision of Barton J., that the resolution of the 16th May was invalid, and that the debentures issued to C. and T., having been issued in pursuance of that resolution, were void, notwithstanding that C. and T. were not present at the meeting at which the debentures were issued.

At a meeting of directors held on the 20th January, 1904, at which K., D., and H. were the directors present, it was resolved to issue certain second debentures in trust for persons making advances to the company, as security

Barton J.
1914.
1915.
Cox
v.
Dublin City Distillery (No. 2).

for such advances, and in pursuance of this resolution second debentures were issued in trust for C. and T. (directors). In pursuance of the same resolution second debentures were also issued to K. and D.

Held, by the Court of Appeal, affirming the decision of Barton J., that the resolution of the 20th January, 1904, was invalid, and that the debentures issued to C. and T. in pursuance of it were void.

Held, also, by the Court of Appeal, affirming the decision of Barton J., that the holders of the void debentures could not claim the benefit of the trust deed of 1895.

The effect of the decision in *Doherty* v. *Kennedy*, [1912] 1 I.R. 349, 363; [1914] A.C. 823, as to the right of a holder of invalid debentures to rely on the trust deed securing them, considered.

In pursuance of the resolutions of the 16th May, 1903, and 20th January, 1904, certain second debentures were issued in trust for persons who were outsiders, and had no notice of any irregularity in the resolutions.

Held, by the Court of Appeal, affirming the decision of Barton J., that such debentures were valid, and that their validity could not be questioned either by the company or the holders of other second debentures.

County of Gloucester Bank v. *Rudry Merthyr Steam and House Coal Colliery Company*, [1895] 1 Ch. 629, followed.

Mowatt v. *Castle Steel and Iron Works Company*, 34 Ch.D. 58, distinguished.

In the course of the present action, which was brought by a holder of first debentures, D. and K. applied to the judge for liberty to institute a joint action to establish their rights in respect of (*inter alia*) the second debentures issued to them. An order was made on this application, giving D. liberty to proceed with an action against the trustees of the second debenture holders and the company, for the purpose of establishing the rights of the applicants. The action was brought by D. in his own name alone, and dealt with his own rights only. It resulted in a judgment in his favour as regarded his debentures. The validity of the debentures issued to K., C., and T. having been challenged in the present proceedings by the other second debenture holders and by the liquidator of the company:

Held, by Barton J., that the judgment in D.'s action could be relied on by K., but not by C. or T., by way of estoppel.

Held, by the Court of Appeal, reversing the decision of Barton J., that K. could not rely on this judgment by way of estoppel.

What is necessary to constitute a test action, considered.

Memorandum from Chief Clerk submitting for the consideration of Barton J. the following question:—

Whether the resolutions of the directors of the defendant Company, passed on the 12th and 16th May, 1903, respectively,

and on the 20th January, 1904, are invalid and of no effect, by reason of the meetings at which such resolutions were passed not being properly constituted for the purpose of passing same, and if so, whether the second mortgage debentures set out in the schedule hereto, which were issued in pursuance of said resolutions, are void and of no effect, and do not create any security in favour of the holders of same.

SCHEDULE.

Name of present Holder.	No. of Debentures and amount.	Debenture Nos., both inclusive.	Amount of Principal.
Frederick Hans Kennedy, as Trustee for Frederick Kennedy.	38 of £100	191 to 212 256 to 261 281 to 290	£3800
Frederick Hans Kennedy, as Trustee for Percy Bence Trower, deceased.	20 of £100	231 to 240 271 to 280	£2000
Frederick Hans Kennedy, as Trustee for Percy Vardon Churton, deceased.	20 of £100	244 to 252 291 to 300	£2000
Frederick Hans Kennedy, as Trustee for Alfred W. Howes.	2 of £100	254 to 255	£200
Frederick Hans Kennedy, as Trustee for Adam S. Findlater, deceased.	5 of £100	266 to 270	£500
Frederick Hans Kennedy, as Trustee for William Findlater.	5 of £100	213 301 to 304	£500

The Company was incorporated in the year 1890 for the purpose of carrying on the business of whisky distillers. By the articles of association the directors had power to create and issue debentures, or borrow money by mortgage of the assets of the Company. In 1890, a sum of £35,000 was raised by the issue of first debentures. On the 5th October, 1895, the directors authorized the issue of £25,000 second debentures. These

Barton J.
1914.
—
1915.
Cox
v.
Dublin City
Distillery
(No. 2).

second debentures were secured by a trust deed, dated the 9th November, 1895. By this deed certain freehold and leasehold premises, the property of the company, were conveyed to Frederick Hans Kennedy and William Findlater as trustees for the second debenture holders, and the company covenanted with the trustees to pay the principal moneys and interest secured by the second debentures, and that the same should be a charge on the mortgaged premises.

Second debentures to the amount of £13,570 had been issued for cash prior to the year 1900.

The debentures in question in the present proceedings were isued in pursuance of resolutions passed at meetings of the directors held in the years 1903 and 1904. The following are extracts from the minutes of the meetings of the directors authorizing the issue of these debentures.

Minutes of meeting of directors held 12th May, 1903: "Present—Frederick Kennedy, Edward Doherty, A. J. Howes." "In consideration of advances made by Frederick Kennedy and Edward Doherty to the Distillery for the purpose of carrying on the business, a large portion of which advances are made without security, It is resolved that second debentures to the amount of £4000 be issued to Frederick Hans Kennedy as trustee for the said Frederick Kennedy and Edward Doherty, the understanding being that when all advances made by the said Frederick Kennedy and Edward Doherty are paid, with interest at 5 per cent., the debentures shall be re-transferred to the company."

Minutes of meeting of directors held 16th May, 1903: "Present—F. Kennedy, P. V. Churton, P. B. Trower, Edward Doherty, and A. J. W. Howes. Minutes of last meeting read and confirmed." After referring to an agreement for the adoption of a certain process of yeast-making which would necessitate the erection of new plant, the minute proceeded: "The estimated probable expenditure on the new plant was read as likely to be from £1500 to £2000, and the directors present agreed to advance the following sums on account:—Messrs. Trower, Churton, and Kennedy, each £300; Mr. Doherty, £150; and Mr. Howes, £100. As security for such advances made for the purpose of installing the proposed yeast-plant, it was resolved to

hand £4000 second debentures to Mr. Frederick Hans Kennedy as trustee for those making such advances, £100 debentures to be held against each £50 advanced, and on the understanding that, when all such advances are repaid with interest at 5 per cent. per annum, the debentures shall be re-transferred to the company."

Minutes of meeting of directors held on 27th May, 1903: "Present—F. Kennedy, Edward Doherty, A. J. W. Howes. Minutes of last meeting read and confirmed." "The issue of 40 second debentures of £100 each, numbered 191 to 230 inclusive, to Frederick Hans Kennedy as per resolution of 12th May, and confirmed at full board meeting of 16th May, was duly made, and the debentures sealed and signed."

Minutes of meeting of directors held 25th June, 1903: "Present—Edward Doherty, A. J. W. Howes. Minutes of last three meetings read and confirmed." "Second debentures signed and sealed as follows:—40 of £100 each, Nos. 231 to 270 inclusive, in name of Frederick Hans Kennedy as per resolution of 16th May, 1903, and as securities for advances to be made to provide the new yeast-plant."

Minutes of meeting of directors held 20th June, 1904: "Present—Frederick Kennedy, Edward Doherty, A. J. W. Howes. Minutes of last five meetings read and confirmed." "It was resolved that second debentures Nos. 271 to 304 of £100 each, and 305 to 307 of £10 each, be handed to Mr. Frederick Hans Kennedy as trustee for those making otherwise unsecured advances to the Distillery in connexion with the new yeast-plant and carrying on the business, and on the same terms as provided for in the minutes of 12th and 16th of May, 1903. The debenture bonds were accordingly sealed and signed."

The debentures issued in pursuance of the above resolutions were entered in the register of the Company as follows:—

Name.—Frederick Hans Kennedy.

Address.—4 Lower Ormond Quay.

Description.—As trustee for Messrs. Frederick Kennedy, Percy Bence Trower, Percy Vardon Churton, Edward Doherty, and Alfred J. W. Howes, and as collateral security for loans made by them.

Barton J.
1914.
—
1915.
Cox
v.
Dublin City Distillery (No. 2).

SECOND DEBENTURES ACQUIRED.

Date.	Ref. Folio.	Distinctive numbers of Debentures (both inclusive). From	To	No. of Debentures.	Total Amount paid up.
1903	Minute Book.				
May 29, .		191	230	40	£4000
June 25, .		231	270	40	£4000
		271	307	34 of £100 3 of £10	£3430
As follows :—					
F. Kennedy, .		191 256 281	212 261 290	—	£3800
P. B. Trower,		231 271	240 280	—	£2000
P. V. Churton, .		244 291	253 300	—	£2000
Ed. Doherty, .		214 241 262 305	230 243 265 307	—	£2430
A. J. W. Howes, .		254	255	—	£200
A. S. Findlater, .		266	270	—	£500
Wm. Findlater, .		301	304 213	—	£500

At the time of the transactions in question the directors of the Company were Messrs. Frederick Kennedy, P. B. Trower, P. V. Churton, Edward Doherty, and A. J. W. Howes. Mr. A. S. Findlater had been a director up to 1899, but ceased to be such in that year. Mr. William Findlater was one of the trustees of the trust deed of the 9th November, 1895, but had never been a director of the Company. There was no evidence that either of the Messrs. Findlater had any notice of the irregularity in the issue of the debentures.

Article 93 of the articles of association of the Company provided that the Company might make contracts with any of the directors upon such terms as the directors should think fit. Article 94 provided that no director should vote in respect of any

contract or matter in which he was individually interested otherwise than as a member of the Company. By article 109 the quorum of directors necessary for the transaction of business was fixed, until otherwise determined by the directors, at two. Article 113 provided that all acts done at any meeting of the directors should, notwithstanding that it should afterwards be discovered that there was some defect in the appointment of such directors or that they or any of them were disqualified, be as valid as if every such person had been duly qualified and was qualified to be a director.

The present action was instituted by the plaintiff, John Mouritz Cox, a holder of first debentures, on the 5th February, 1905. He sued on behalf of himself and all other holders of first debentures, claiming a declaration that certain first mortgage debentures were well charged on all the property, present and future, of the company.

The defendants were the Dublin City Distillery, Limited; Frederick Kennedy sued as the surviving trustee of the trust deed securing the first debentures; Alfred J. W. Howes, on behalf of himself and all others the holders of second mortgage debentures; and Frederick Hans Kennedy and William Findlater sued as trustees of the trust deed for the second debenture holders.

On the 25th March, 1905, a petition was presented by J. M. Cox, as a preference shareholder, to wind up the company. On the 31st July, 1905, a winding-up order was made by Barton J., and a liquidator appointed, but no further steps were taken in this matter.

The present action came on for hearing before Barton J., on the 16th March, 1905, when an order was made declaring the first debentures well charged on the company's property, and directing the usual accounts and inquiries as to incumbrances. This order was affirmed by the Court of Appeal. See case reported, [1906] 1 I. R. 446.

On the 12th March, 1909, a summons was issued in the present action by Edward Doherty and Frederick Kennedy, applying that they might be at liberty to institute and prosecute an action against the trustees of the second debenture holders and the Company,

Barton J.
1914.
—
1915.
—
Cox
v.
Dublin City
Distillery
(No. 2).

for the purpose of establishing the rights of the said Edward Doherty and Frederick Kennedy as pledgees of certain whiskies, and as chargeants upon certain second mortgage debentures. The summons was grounded on an affidavit of Edward Doherty, in which he referred to former affidavits of himself and Frederick Kennedy, filed in the action, verifying their respective claims. On the hearing of this summons an order was made by Barton J., the material portion of which was as follows :—"Upon the application of Edward Doherty and Frederick Kennedy . . . It is ordered that the applicant, Edward Doherty, be at liberty to proceed with an action against the trustees of the second debenture holders and the defendant company for the purpose of establishing the rights of the applicants as pledgees of certain whiskies, and as chargeants upon certain second mortgage debentures . . ."

On the 6th December, 1909, an action was commenced by Edward Doherty in his own name against the Company, and the trustees for the second debenture holders, claiming—1, that he had a valid pledge on certain whiskies in priority to the second debenture holders, and 2, that he was entitled to a valid lien on the second debentures issued to him for advances made to the company. The decision, ultimately by the House of Lords, was in favour of Doherty as regards the validity of his lien on the debentures issued to him (1). In this action the point was not raised or dealt with as to the invalidity of the resolutions for the issue of the second debentures in question, the only objection taken being that the debentures were invalid for want of registration under the 14th section of the Companies Act, 1890.

Sergeant Matheson K.C., *S. L. Brown K.C.*, and *Dickie K.C.*, for the liquidator.

Littledale K.C., and *O. Plunkett*, for the trustees for the second debenture holders.

Ronan K.C., *Healy K.C.*, and *Denning K.C.*, for Frederick Kennedy.

(1) [1912] 1 I. R. 349, 363; [1914] A. C. 823.

Herbert Wilson K.C., and *Chambers K.C.*, for the representatives of P. B. Trower, and the representatives of P. V. Churton.

Henry K.C., for William Findlater, and the representatives of Adam S. Findlater.

Serjeant Sullivan K.C., and *Overend*, for William Carroll, George Richardson, and Patrick J. Gaynor, holders of second debentures issued for cash.

The arguments were similar to those in the Court of Appeal, reported *infra*, p. 358.

BARTON J.:— Feb. 24.

This Memorandum from the Chief Clerk involves five questions:—(1) whether certain resolutions, authorizing the issue of debentures to a trustee upon trust for certain directors and others by way of security, were invalid owing to the want of a legally qualified quorum of directors; (2) whether the charges which they purported to create in favour of directors upon those debentures were void; (3) whether the charges they purported to create in favour of non-directors were void; (4) whether the action of *Doherty* v. *Kennedy* (1) was a test action so far as Mr. F. Kennedy is concerned, so as to preclude the parties to that action, and those claiming through them, from disputing the validity of Mr. Kennedy's charge; and (5) whether that action was a test case so far as the other directors, Churton and Trower, were concerned, so as to preclude the validity of their charges being disputed by the parties to that action or those claiming under them.

As regards the first question, I am of opinion that the three resolutions of the 12th and 16th May, 1903, and 20th January, 1904, were invalid. Article 94 of the Company's articles of association provides that no director shall vote in respect of any contract or matter in which he is individually interested, otherwise than as a member of the company. Article 109 fixes the quorum,

(1) [1912] 1 I. R. 349, 363; [1914] A. C. 823.

Barton J.
1915.

Cox
v.
DUBLIN CITY DISTILLERY (No. 2).

until otherwise determined, at two. At the meeting of the 12th May, 1903, three directors were present, Kennedy, Doherty, and Howes, who resolved to issue £4,000 debentures to a trustee, whom I treat as an outsider, in trust for Kennedy and Doherty by way of security for advances. The case is quite indistinguishable in principle from *In re Greymouth Point Elizabeth Railway & Coal Co.* (1). By the resolution of the 16th May, five directors, Doherty, Kennedy, Churton, Trower, and Howes, resolved to issue £1,150 debentures to the same trustee in trust for themselves in various proportions by way of security for advances. This resolution cannot, in my opinion, be split up, and is equally bad. By the resolution of the 20th January, 1904, three directors, Kennedy, Doherty, and Howes, resolved to issue thirty-seven debentures to the same trustee in trust for those making advances for a new yeast-plant by way of security, and proceeded to sign, seal, and issue debentures to themselves and other directors. The resolution was a nullity, and the two other directors cannot be regarded as outsiders who took without notice of the board's minutes.

Next I come to the case of debentures issued to non-directors. Four debentures were issued to the same trustee on May 16th, 1903, in trust for Adam S. Findlater; one debenture was issued on May 12th, 1903, and four on 20th January, 1904, to the same trustee, for William Findlater. One of these gentlemen had been a director some years previously; the other was a trustee for the second debenture holders; but they were not directors in 1903 and 1904; and, *quâ* the board of directors, I hold them to be outsiders, to whom notice of the board's minutes cannot be attributed. In such a case the onus lies, in my opinion, upon the party impeaching the debentures to show that a person who is prima facie an outside holder of a debenture, which is good on its face, had actual or constructive notice of the irregularity: *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.* (2). Accordingly, I hold that, although these resolutions were invalid, the ten debentures issued to a trustee for the Messrs. Adam and William Findlater are valid and binding.

(1) [1904] 1 Ch. 32. (2) [1895] 1 Ch. 629.

The next question is whether the action of *Doherty* v. *Kennedy* (1) was a test action, 1, as regards Mr. Kennedy's right, and 2, as regards Mr. Churton's and Mr. Trower's rights as chargeants on the debentures—so as to preclude the parties to that action or their privies from challenging the validity of the charges.

Upon this branch of the case Mr. Kennedy stands upon a much stronger footing than the other directors.

On the 12th March, 1909, a summons was taken out in this action by Edward Doherty and Frederick Kennedy for liberty to institute and prosecute an action against the trustees of the second debenture trust deed, and against the Company, for the purpose of establishing their rights, (1) as pledgees of certain whiskies, and (2) as *chargeants* upon these second debentures which are in question upon the memorandum. The summons was addressed to the solicitor for the liquidator, and was grounded upon an affidavit of Edward Doherty, in which he made it clear that the action was to be on Kennedy's behalf as well as his own, and was brought not merely for the purpose of establishing their rights as pledgees, but also as chargeants on these second debentures, which are now before the Court.

Upon the hearing of the summons on the 27th April, 1909, the trustees of the second debenture holders and the liquidator were represented by counsel, and it was ordered, upon the application of Edward Doherty and Frederick Kennedy, that Edward Doherty be at liberty to proceed with an action against the trustees for the second debenture holders and the company for the purpose of establishing the rights of the *applicants* as *pledgees* of certain whiskies, and as *chargeants* upon these several mortgage debentures.

It will be observed that the order departed from the summons in directing that there should be one plaintiff, namely, Doherty, not two, but it treated the action as an action brought for the purpose of establishing the rights of both applicants.

Mr. Doherty issued his writ on the 6th December, 1909, in which he claimed, (1) a declaration as regards pledges, and (2) a declaration that he was entitled to a good and valid charge on

(1) [1912] 1 I. R. 349, 363; [1914] A. C. 823.

Barton J. 1915.

Cox v. Dublin City Distillery (No. 2).

these debentures. The trustees for the second debenture holders and the company were made defendants.

The action proceeded upon the basis, upon which it was authorized and instituted, namely, that it was to try the right of the plaintiff both to the pledges on whiskies and to the charge on the debentures. In paragraph 26 of the statement of claim, and clause 5 of the prayer, the plaintiff alleged the material facts upon which his claim to a charge on these debentures was based, and prayed for a declaration of his right to a good and valid lien on the debentures. The defendants, in paragraph 15 of the statement of defence, pleaded that the issue of these debentures was void. That is what this Court is asked to declare to-day. The question which is raised upon this memorandum was open under that plea. No contentious question of fact was raised about the debentures; but questions of law were raised, and it was held that a valid charge was created upon the premises comprised in the debenture trust deed, and a declaration was made in this Court to that effect. The company appealed upon that point unsuccessfully to the Court of Appeal and to the House of Lords. The order in the House of Lords expressly affirmed, and protected the plaintiff as regards the costs of, that portion of the order of this Court which declares that "the respondent [Doherty] is entitled to a good and valid lien on the debentures mentioned in the 26th paragraph of the statement of claim so far as same affects the freehold and leasehold premises described in the trust deed."

Accordingly, Mr. Doherty's claim as chargeant on the debentures has run the gauntlet of this Court, the Court of Appeal, and the House of Lords, and his right to a charge on these debentures has been affirmed in all three Courts. By the express terms of the order of the 27th April, 1909, the action was to decide, and has decided, as between the parties to that record, and those claiming through them, Mr. Kennedy's right also; and the liquidator cannot, in my opinion, re-open the question of Mr. Kennedy's right as a chargeant on the debentures. Serjeant Sullivan observed that he did not admit that the proceedings in *Doherty* v. *Kennedy* (1) precluded his clients, who are other second debenture

(6) [1912] 1 I. R. 349, 363; [1914] A. C. 823.

holders, from disputing the validity of Mr. Doherty's debentures, and his observation would include Mr. Kennedy. I express no opinion upon that subject, as the validity of Mr. Doherty's debentures was not open upon this memorandum.

I now turn to the case of the other directors who were not parties to the order of April 27th, 1909. It appears that in November, 1909, before the writ in *Doherty* v. *Kennedy* (1) was issued, the plaintiff instituted a motion, asking leave to bring such proceedings as he might be advised, to test the validity of certain claims to pledges made by the directors of this Company, and complaining that Doherty had not yet taken proceedings under the order of the 27th April, 1909. Before that motion was heard, Doherty's writ had been issued; and on the 14th December, 1909, an order was made upon plaintiff's motion, allowing the receiver in the debenture action to defend the action of *Doherty* v. *Kennedy* (1), and to proceed as he might be advised against Percy V. Churton for the purpose of testing the validity of the claims and pledges. In pursuance of this leave a writ was issued on the 29th January, 1910, against Percy V. Churton, in which the relief claimed was limited to the claim for pledges on whisky, and that action stood over by consent to abide the results of the Doherty action as regards the pledges.

It is clear that the order giving iberty to bring the action against Churton, and the action when it was brought, were limited to the question of pledges on whiskies, and did not touch the question of the charge on debentures which is before the Court upon this memorandum. The action against Churton was a test action, but only *quâ* the pledges, and not *quâ* the charge upon the debentures. It might have been a test case *quâ* the charge upon the debentures, as it was in *Kennedy's Case* (1), but it never was. Churton and the other directors never staked their right to charges upon the debentures upon the result in that action, as Kennedy did. If in the action of *Doherty* v. *Kennedy* (1), Doherty had failed as regards the charge on the debentures, Kennedy would have been bound by that result, and they would not have been bound.

Accordingly I hold that the directors, other than Kennedy,

(1) [1912] 1 I. R. 349, 363; [1914] A. C. 823.

Barton J. 1915.

Cox v. Dublin City Distillery (No. 2).

have no effective charges upon these debentures which were issued under the three resolutions mentioned in the memorandum.

There will be a declaration that the debentures which are described in the schedule to the memorandum as being held by Frederick Hans Kennedy as trustee for Percy Bence Trower, deceased, Percy Vardon Churton, deceased, and Alfred J. W. Howes, are void and of no effect, and do not create any security in favour of the holders of same.

D. M. S.

Appeal. 1915.

William Carroll, George Richardson, and Patrick J. Gaynor appealed from the order of Barton J., in so far as it declared that the second mortgage debentures (mentioned in the schedule to the memorandum) held by Frederick Hans Kennedy in trust for Frederick Kennedy (since deceased), Adam S. Findlater, and William Findlater, were valid, and created an effective charge on the said debentures.

The liquidator of the Company also appealed from this portion of the order, but subsequently withdrew his appeal as regarded the debentures issued in trust for A. S. Findlater and William Findlater.

The representatives of Trower and Churton appealed from the order in so far as it declared that the second mortgage debentures held in trust for Trower and Churton were void, and did not create any security in favour of their representatives (1).

Serjeant Sullivan K.C. (with him *Overend*), for William Carroll, George Richardson, and Patrick J. Gaynor, holders of second debentures:—

The second debentures referred to in the memorandum are invalid, inasmuch as the resolutions of the directors in pursuance of which they were issued were invalid. At the meeting of the 12th May, 1903, of the three directors present, two of them, Kennedy and Doherty, were interested in the subject-matter of the resolution, and, therefore, not competent to vote, consequently

(1) In the Court of Appeal before Cherry L.C.J., Palles C.B., and Molony L.J.

there was no legal quorum. A quorum of directors means a quorum competent to transact and vote on the business before the board, and therefore a resolution passed at a meeting of three directors, two of whom are interested in the subject-matter of the resolution, is invalid: *In re Greymouth Point Elizabeth Railway and Coal Company, Limited*; *Yuill* v. *Greymouth Point Elizabeth Railway and Coal Company, Limited* (1). Even apart from the question of quorum, the resolution was bad as being a breach of trust. A director is a trustee for the company, and, as such, is precluded from dealing on behalf of the company with himself: *Aberdeen Railway Company* v. *Blaikie Brothers* (2); *Gaslight Improvement Company* v. *Terrell* (3). At the meeting of the 16th May, 1903, all the directors present were interested in the subject-matter of the resolution. At the meeting of the 27th May, 1903, of the three directors present, two, Kennedy and Doherty, were interested in the resolution. At the meeting of the 25th June, 1903, two directors only were present, one of them, Doherty, being an interested party. At the meeting of the 20th January, 1904, there were three directors present, Kennedy, Doherty, and Howes. Of the debentures resolved to be issued at that meeting, some were allotted in trust for Kennedy and some in trust for Doherty, as appears by the Company's register of debentures. All the resolutions therefore were invalid.

As regards the debentures issued in trust for Adam S. Findlater and William Findlater, Barton J. has held that these gentlemen were to be regarded as outsiders without notice of any irregularity, and that therefore these debentures were good; and he cites the case of *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company* (4). But that case merely decides that in such circumstances the debentures will be valid as between the holder and the company. The other debenture holders, however, are not estopped from setting up the invalidity: *Mowatt* v. *Castle Steel and Iron Works Company* (5). Moreover, Mr. William Findlater cannot be considered as an outsider, since

(1) [1904] 1 Ch. 32.
(2) 1 Mac Q. 461.
(3) L. R. 10 Eq. 168.
(4) [1895] 1 Ch. 629.
(5) 34 Ch. D. 58.

Appeal. 1915.

COX v. DUBLIN CITY DISTILLERY (No. 2).

he was a trustee of the trust deed securing the second debentures. Further, it is not shown that the Messrs. Findlater had not notice of the irregularity.

The decision in the action of *Doherty* v. *The Company* (1) does not estop us from disputing the validity of any of the debentures in question. Although the application for liberty to bring that action was made by both Doherty and Kennedy, the order of Barton J. gave liberty to Doherty alone to proceed, and the action was brought by Doherty, not jointly with Kennedy, nor as a representative action, but on behalf of himself alone; and, so far as the validity of the second debentures was concerned, the only point raised or decided was as to Doherty's debentures. Even as to them, the only matter decided was that Doherty had a good charge on the property comprised in the trust deed, notwithstanding that his debentures had not been registered as required by sect. 14 of the Companies Act, 1900. The present question as to the invalidity of the resolutions to issue the debentures was not raised. In any event, even if there was an estoppel as against the Company, there could be no estoppel as against the other second debenture holders who were not parties to that action. The trustees for the second debenture holders were made parties, but trustees do not represent their cestuis que trust where there is a contention between the cestuis que trust *inter se*: *Hamond* v. *Walker* (2)

S. L. Brown K.C. (with him *Dickie K.C.*) for the liquidator of the company:—

We have withdrawn our appeal as to the validity of the debentures issued in trust for the Messrs. Findlater, being of opinion that, having regard to the authorities, the validity of these debentures cannot be questioned by the Company.

As regards the other debentures in question, we contend that they are void by reason of the invalidity of the resolutions for their issue: *In re Greymouth Point Elizabeth Railway and Coal Company, Limited* (3); *Young* v. *Naval, Military, and Civil Service Co-operative Society for South Africa* (4).

(1) [1912] 1 I. R. 349, 363; [1914] A. C. 823.
(2) 3 Jur. (N. S.) 686.
(3) [1904] 1 Ch. 32.
(4) [1905] 1 Q. B. 687.

The decision in *Doherty* v. *The Company* (1) cannot operate as an estoppel in favour of Kennedy, since it was brought by Doherty in his own name alone, and dealt only with his own rights. If there had been a special defence against Kennedy, it could not have been determined in that action. The action cannot be treated as a test action. To constitute a test action there must be either (*a*) an agreement to that effect between the parties, or (*b*) an order of the Court such as was made in *Amos* v. *Chadwick* (2) and *Bennett* v. *Lord Bury* (3).

Healy K.C. and *Denning K.C.*, for the representatives of Frederick Kennedy :—

The decision in *Doherty* v. *The Company* (1) operates as an estoppel in favour of Kennedy. It was intended by all the parties that the decision should determine the rights of all persons having interests similar to those of Doherty. The application for liberty to bring the action was made on behalf of both Doherty and Kennedy. The order giving leave to bring the action is in its terms founded on that joint application, and gives liberty to Doherty to proceed with an action for the purpose of establishing the rights of the "applicants." No defence can be suggested against Kennedy which would not also have been available against Doherty.

But even if the debentures issued in trust for Kennedy were invalid, he was entitled, under the trust deed of the 9th November, 1895, to a good charge upon the premises comprised in that deed for the amounts advanced by him. That has been decided by the House of Lords in *Dublin City Distillery* v. *Doherty* (4). Lord Parker, in his judgment (p. 859), states that the security is conferred by the trust deed and not by the debentures, and that even if the debentures had not referred to the trust deed, the respondent would have been a cestui que trust thereunder. He says that the case is analogous to a charge for the portions of younger children in a settlement of real estate; the portions are conferred by the settlement, and not by the birth of the cestuis que trust.

(1) [1912] 1 I. R. 349, 363; [1914] A. C. 823.
(2) 4 Ch. D. 869.
(3) 5 C. P. D. 339.
(4) [1914] A. C. 823.

Appeal. 1915.

COX v. DUBLIN CITY DISTILLERY (No. 2).

Herbert Wilson K.C. (with him *Chambers K.C.*, and *Andrews*), for the personal representatives of P. B. Trower, and the personal representatives of P. V. Churton :—

The debentures issued in trust for Trower and Churton were not issued in pursuance of the resolution passed at the meeting of the 16th May, 1903. That resolution was merely an invitation to persons to make advances. It created no contract. The resolutions in pursuance of which the debentures in trust for Trower and Churton were issued were those passed at the meeting of the 25th June, 1903, and the 20th January, 1904, at which meetings neither of them was present.

Even assuming that the debentures had been issued in trust for them in pursuance of the resolution of the 16th May, 1903, they would have been good. The resolution is divisible, and, in so far as it directed debentures to be issued in trust for Trower and Churton, there were sufficient other directors present to form a quorum.

In the *Greymouth Case* (1) there was a provision in the articles of association that if an interested director voted his vote should not be counted. There is no such provision in the articles of association of the company here.

But it is not necessary to rely on the debentures. Apart from them altogether, Trower and Churton got a good charge on the premises comprised in the trust deed of the 9th November, 1895. Having advanced moneys under a contract, they became cestuis que trust under that deed. The security is conferred by the deed, and not by the debentures. This was decided by the House of Lords in *Dublin City Distillery* v. *Doherty* (2). See especially the statement of Lord Parker, already cited. [He also referred to *Appleyard* v. *New London and Suburban Omnibus Company* (3); *In re Spiral Globe, Limited* (No. 2) (4); *Wright* v. *Horton* (5).]

Henry K.C. for William Findlater and the representatives of Adam S. Findlater :—

My clients were complete outsiders, and had no notice of any

(1) [1904] 1 Ch. 32.
(2) [1914] A. C. 823.
(3) [1908] 1 Ch. 621.
(4) [1902] 2 Ch. 209.
(5) 12 A. C. 371

irregularity in the issue of the debentures, and consequently the debentures issued in trust for them are valid: *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company* (1). They are also protected by Art. 113 of the articles of association, which makes valid all acts done at a meeting of directors, notwithstanding that any of the directors were disqualified.

Serjeant Sullivan K.C. in reply:—

All that was done at the meeting of the 25th June, 1903, was to seal the debentures which had already been resolved to be issued at the meeting of the 16th May—a mere ministerial act. The resolution of the 16th May cannot be split up as suggested: *Young* v. *Naval, Military, and Civil Service Co-Operative Society of South Africa* (2), approved by the Court of Appeal in this country in *In re Erin Insurance and Investment Company, Limited* (3).

The holders of the impeached debentures cannot claim the benefit of the trust deed. To bring a person within that deed there must have been a valid contract for the issue of debentures to him. The judgments in the House of Lords in *Doherty's Case* (4) are based on the assumption that the resolutions for the issue of the debentures were valid. [He also referred to *In re Jackson & Bassford, Limited* (5).]

Cur. adv. vult.

June 28.

CHERRY L.C.J.:—

In this appeal an important question is raised as to the validity of certain debentures issued to persons alleged to stand in a fiduciary relation to the company. The question came before the Court on a memorandum submitted by the chief clerk, inquiring whether certain resolutions of the directors passed on the 12th and 16th May, 1903, and on the 20th January, 1904, are invalid, by reason of the meetings not having been properly constituted for the purpose of passing same; and, if so, whether certain second mortgage debentures, set out in the schedule, which were issued in

(1) [1895] 1 Ch. 629.
(2) [1905] 1 Q. B. 687.
(3) Unreported. C. A., 1914, June 4.
(4) [1914] A. C. 823.
(5) [1906] 2 Ch. 467.

Appeal. 1915.

Cox v. Dublin City Distillery (No. 2).

Cherry L.C.J.

pursuance of these resolutions were void in consequence of such irregularity.

By a resolution dated the 5th October, 1895, power was conferred to issue second debentures not exceeding £25,000 in value, and these were secured by a trust deed dated the 9th November, 1895. Shortly afterwards, debentures to the amount of £13,570 were issued to outsiders for cash fully paid up. The remainder of the amount originally authorized was issued in the years 1903 and 1904, by way of mortgage, to secure advances amounting to one-half of the full value of same, in the manner set out in the judgment of Barton J. The validity of these latter debentures is now contested by the holders of the debentures issued in 1895; and as there are not sufficient funds available to pay all in full, the questions raised are of importance to the parties.

Different considerations arise as to the several holders of the impugned debentures. Three distinct classes were each separately represented before us, and it will be necessary to deal separately with each. 1. There were parties who were, at the time of the issue of the debentures to them, directors of the company. These (Messrs. Churton and Trower) were represented by Mr. Wilson K.C. 2. There were the representatives of the late Mr. Frederick Kennedy, who was also a director at the time of the issue of the shares, but who claimed the benefit, by way of estoppel, of the decision of the House of Lords in a case of Doherty against the company. They were represented by Mr. Healy K.C. And, 3. There were the two Messrs. Findlater, one of whom had been a director, but neither of whom was a director at the time of the issue of the debentures to him.

1. As regards Messrs. Trower and Churton, the first resolution dealing with the issue of debentures to them was passed at a meeting of the directors held on the 16th May, 1903. All the directors of the company, five in number, were present at this meeting, and each of them agreed to advance a sum, stated in the minutes, to enable the company to purchase new plant. Messrs. Trower and Churton agreed to advance £300 each, as stated in the minutes. "As security for such advances," the minutes proceed, "made for the purpose of installing the proposed yeast-plant, it was resolved to hand £4,000 second

debentures to Mr. Frederick Hans Kennedy as trustee for those making such advances, £100 debentures to be held against each £50 advanced, and on the understanding that when all such advances are repaid with interest at 5 per cent. per annum, the debentures shall be re-transferred back to the company."

Now, that resolution was, in my opinion, the contract for the issue of debentures to the directors; and, inasmuch as all the directors were interested in it, it was, in my opinion, absolutely void, under the decision of Farwell J. in the *Greymouth Case* (1), referred to by Barton J. in his judgment. The articles of association in this case, as in the *Greymouth Case* (1), provided that although contracts might be made by the company with the directors, no director should vote on any matter in which he was individually interested (Articles 93 & 94). The fact that in the *Greymouth Case* (1) the article went on to provide (which it does not do here) that if he voted his vote was not to be counted, makes, in my opinion, no difference. That follows, as a matter of law, from the prohibition.

Mr. Wilson meets this argument in a very ingenious way. He does not dispute the authority of the *Greymouth Case* (1), for, though it was the decision of a single judge (Farwell J.), it was that of a judge of very high authority, and it has always been accepted as good law. He says, however, that it does not apply to the present case, on the ground that the contract between the company and his clients was made, not at the meeting of the directors held on the 16th May, 1903, but at those held on the 25th June, 1903, and 20th January, 1904, when neither of his clients was present. But, at these meetings, the debentures were merely issued to a trustee for the mortgagees on the terms of the agreement entered into on the 16th of May, and the issue is described in the minutes as being made "as per resolution of 16th May, 1903"; thus plainly recognizing that the contract for this issue was then made.

Mr. Wilson further argues that, even if the debentures are invalid, the persons who paid their money on the faith of them are entitled to claim the benefit of the trust deed of 9th November,

(1) [1904] 1 Ch. 32.

Appeal. 1915. Cox v. Dublin City Distillery (No. 2). Cherry L.C.J.

1895, *pari passu* with other holders of second debentures. He relies, in this portion of his case, on the decision of the House of Lords in *Dublin City Distillery* v. *Doherty* (1), and refers in particular to the judgment of Lord Parker, [1914] A.C. at p. 859. But the foundation for that decision was the existence of a valid contract. It was assumed in *Doherty's Case* (1) (for the point as to the original invalidity of the resolution of the directors was not there raised as it is here) that there was a good contract for *the issue* of the debentures, and that the latter were only rendered partially invalid by the want of registration under the 14th section of the Companies Act, 1900. But here the effect is quite different, for every step in the transaction is tainted by the original invalidity of the first resolution; and the holders of these invalid debentures can, in my view, only claim as unsecured creditors a return of the moneys advanced by them. For these reasons I think that the decision of Barton J. as regards these directors was right, and should be affirmed.

2. I come now to Kennedy's case, and I confess that I can see no difference between his position and that of the other directors. He was present at the meeting of the 16th May, 1903, at which the bargain was made between himself and the company. Prima facie, therefore, it would appear that his debentures are as invalid as those of Churton and Trower. His representatives claim, however, by way of estoppel, the benefit of the decision of the House of Lords in *Doherty's Case* (1). They say that the action of *Doherty* v. *Dublin City Distillery* (2) was brought as a test action to determine the rights of Doherty and Kennedy. This contention is founded on the terms of the order of the 27th April, 1909, giving leave to bring the action. That order was made on the application of both Doherty and Kennedy, and gave leave to Doherty to bring the action alone, "for the purpose of establishing the rights of the applicants" (in the plural). The form of the order is explained by the fact that it was originally intended to bring the action in the names of both applicants, not as a test action, but in order to establish their

(1) [1914] A. C. 823.

(3) [1912] 1 I. R. 349, 363; [1914] A. C. 823

own rights as against the company. Kennedy afterwards, for some reason that does not appear, changed his mind and applied to the Court to allow the action to proceed in Doherty's name alone. Hence the form of the order. If it was intended to be a test action, it should have been one on behalf of all the directors who held these debentures, and not on behalf of two only. But whatever course the order of the 27th April, 1909, may have sanctioned, the action was, as a matter of fact, brought by Doherty to establish his own rights only. Kennedy's name is not mentioned in the pleadings, and the House of Lords have adjudicated upon Doherty's claim and Doherty's claim only. This portion of the judgment of Barton J., should therefore, in my opinion, be reversed, and Kennedy's debentures should be declared invalid and void in the same way as those of Churton and Trower.

There remain only the debentures issued to Messrs. Adam and William Findlater. As to them, I entirely agree with the view of Barton J. Indeed, the rights of these gentlemen were not seriously questioned before us. Adam Findlater had formerly been a director of the company, but he had retired some years before this transaction. William Findlater never was a director. He was, it is true, a trustee of the trust deed securing the second debentures, but that would not prevent him from subscribing for debentures himself. There is no evidence that either of these gentlemen had any notice of the irregularity of the resolutions of May, 1903. They advanced their money on the faith of debentures duly sealed by the company, and apparently regularly issued, and they are, in my opinion, entitled to the full benefit of their security.

PALLES C.B.:—

Three questions have been argued upon the hearing of these appeals:—

1st. Whether the debentures issued by the Company to a trustee for Percy B. Trower and Percy V. Churton were originally invalid.

2nd. Whether the debentures issued by the Company to a

Appeal. 1915. Cox v. Dublin City Distillery (No. 2). Palles C.B.

trustee for Adam S. Findlater and Wm. Findlater were originally invalid; and

3rd. Whether, if such debentures or any of them were so originally invalid, the judgment in *Doherty* v. *The Company* (1) estops the parties here from relying upon that original invalidity.

The ground of invalidity relied on as against Trower and Churton is that, at the time of their issue, these gentlemen were directors of the company, and that the issue took place in pursuance of a resolution, to which five of the directors (of whom these gentlemen were two) were parties, to issue debentures to themselves—a resolution which was void not only under the articles of association, but on the ordinary principle of equity, that a director, being a trustee for the company, cannot vote upon a matter in which he himself has an interest—and that consequently the transaction was not only void, but fraudulent in the sense in which that word is used in a Court of equity.

At the meeting on the 16th May, 1903, the five directors of the company were present—Kennedy, Churton, Trower, Doherty, and Howes.

The first thing that was done was to read and confirm the minutes of the last meeting.

The latter meeting was held on the 12th May. Three directors were present at it—Kennedy, Doherty, and Howes—and at it the following resolution was passed:—"Financial and trading statements read as per agenda. In consideration of advances made by Frederick Kennedy and Edward Doherty to the distillery for the purpose of carrying on the business, a large portion of which advances are without security, It is resolved that second debentures to the amount of £4000 be issued to Frederick Hans Kennedy as trustee for the said Frederick Kennedy and Edward Doherty, the understanding being that when all advances made by the said Frederick Kennedy and Edward Doherty are paid, with interest at 5 per cent., the debentures shall be re-transferred to the Company."

Kennedy and Doherty were interested in that resolution, and were unable to vote on it, and the remaining director present

(1) [1912] 1 I. R. 349, 363; [1914] A. C. 823.

(Howes) did not constitute a quorum. The resolution, therefore, was waste paper, and a breach of trust with which the two other directors, Churton and Trower, who were not present at the meeting of the 12th May, associated themselves by the confirmation of the minutes.

Later on, in the minutes of the 16th, there are the following entries:—"The estimated probable expenditure on the new plant was read as likely to be from £1500 to £2000, and the directors present *agreed* to advance the following sums on account:—Messrs. Trower, Churton, and Kennedy, each £300; Mr. Doherty, £150; and Mr. Howes, £100. As security for such advances made for the purpose of installing the proposed yeast-plant, it was resolved to hand £4000 second debentures to Mr. Frederick Hans Kennedy as trustee for those making such advances, £100 debentures to be held against each £50 advanced, and on the understanding that when all such advances are repaid, with interest at 5 per cent. per annum, the debentures shall be re-transferred back to the company."

It is quite clear that this resolution is also void. Each of the directors present agreed to advance money on the security of debentures, and was therefore disqualified from voting. This was not only decided by Farwell J., in 1904, in the *Greymouth Case*(1), but has been acted upon ever since as settled law. There is no doubt a distinction between the articles of association in the *Greymouth Case* (1) and those in the present case. In the *Greymouth Case* (1) there was a provison that if a director should vote on a matter in which he was personally interested, his vote should not be counted. There is no such provision here. But this distinction is of no importance, and does not affect the principle of the decision.

I do not refer to other authorities, because the proposition is really an elementary one in a Court of equity.

The resolution, therefore, had no valid vote in its favour. It was absolutely void, and any action upon it was a breach of trust.

Now if there were nothing more in the case, there would be nothing to do but to affirm the judgment of Barton J. upon

(1) [1904] 1 Ch. 32.

Appeal.
1915.
Cox
v.
Dublin City Distillery (No. 2).
Palles C.B.

this point. But we have had a very ingenious and lawyer-like argument from Mr. Wilson in support of these debentures, which requires to be noticed. He did not contest anything I have said. He is too much of a lawyer to rest his case on the resolutions of May, 1903. He argued that it was not in pursuance of these resolutions that the debentures were issued to the trustee for Messrs. Trower and Churton, and he endeavours to support these debentures by the resolutions of the 25th June, 1903, and 20th January, 1904, at neither of which either of these gentlemen was present. The entry, however, of the 25th June is not of a resolution. It is no more than a record that at that meeting forty debentures of £100 each were signed and sealed in the name of Frederick Hans Kennedy "as per resolution of 16th May, 1903, and as securities for advances to be made to provide for the new yeast-plant." It is, therefore, no more than the formal execution of that which was directed to be done by the illegal resolution of the 16th May; consequently, these twenty debentures were issued without any valid resolution, or any valid contract by the company to issue them, and were originally void.

The remaining ten debentures issued to Trower and Churton were so issued in pursuance of the resolution of the 20th January, 1904, which is also relied on by Mr. Wilson. It was passed at a meeting at which Kennedy, Doherty, and Howes were present, and is in these words:—"It was resolved that second debentures Nos. 271 to 304 of £100 each, and 305 to 307 of £10 each, be handed to Mr. Frederick Hans Kennedy as trustee for those making otherwise unsecured advances to the Distillery in connexion with the new yeast-plant, and carrying on the business, and on the same terms as provided for in the minutes of 12th and 16th May, 1903."

I do not read that resolution as dealing with the shares that were the subject-matter of the resolution of the 16th May, 1903. I think that new shares were to be allotted to the directors, and for some time I had a difficulty in seeing, and indeed I cannot at present see, that that resolution of the 20th January, 1904, is affected by the invalidity of the resolution of the 16th May, 1903. But on looking into the register of debentures, it appears that of

the debentures the subject-matter of this resolution passed at the meeting of the 20th January, at which the three directors present were Kennedy, Doherty, and Howes, some were allotted to Kennedy and others allotted to Doherty. I bind Trower and Churton by that register, and taking the register and the resolution together, I hold that it was intended by that resolution to issue debentures to Kennedy and Doherty; that this prevented them from being members of the quorum; and that the ten debentures issued in pursuance of the resolution of the 20th January, 1904, must share the fate of those issued in pursuance of the resolution of the 16th May, 1903.

Upon the first question, therefore, I am of opinion that Trower's and Churton's debentures were originally invalid.

The second question is wholly different. It relates to the debentures issued to the Findlaters. Of these gentlemen one, William Findlater, never was a director of the company. The other, Adam Findlater, was at one time a director, but he had ceased to be one long previously to the issue of these second debentures. The Findlaters were at the times of the resolutions to issue them, and of the issue, entirely outsiders. Resolutions as to the issue of debentures are a matter of internal management of the company, and a person bona fide purchasing a debenture without notice of any invalidity or irregularity affecting its issue, is entitled to rely upon the seal of the company as evidencing that all matters of that nature have been duly performed.

Reliance was placed by Serjeant Sullivan in his attack on these debentures on the case of *Howatt* v. *Castle Steel and Iron Works Company* (1). In my opinion that decision does not touch the present case. The question there was whether certain debentures had been issued before the commencement of the winding-up of the company, and it was held that the holders of other debentures were not estopped from impeaching the debentures in question on the ground that they were not issued before the commencement of the winding-up. I do not look upon the present case as one of estoppel at all. It has been decided by a long line of cases, extending back certainly for fifty years, that an outsider

(1) 34 Ch. D. 58.

Appeal. 1915. Cox v. Dublin City Distillery (No. 2). Palles C.B.

taking debentures of this description, which are invalid merely by reason of a matter of internal management, is entitled to rely on the seal of the company as showing that everything connected with such management is right, unless he has notice to the contrary. In the present case, as I have said, the Findlaters had no notice of any irregularity. I am, therefore, of opinion that the debentures issued to Mr. Adam Findlater and Mr. Wm. Findlater must be held to be valid.

This brings me to the third question, viz., whether the judgment in *Doherty* v. *The Company* (1), a decision between a second debenture holder and the Company, estops the valid second debenture holders from alleging that certain of those second debentures not specially represented in that suit are invalid.

Now I do not wish to be misunderstood. I hold that as between Doherty, the plaintiff in that suit, and the Company and the second debenture holders, the whole matter as to the validity of Doherty's claim is *res judicata*. The second debenture holders as a class were represented in that action by their trustees, and therefore the second debenture holders are estopped from raising *as against the plaintiff in that suit,* not only any defences which they did raise in that suit, but also any defence which they might have raised, but did not raise therein.

Here, however, it is not sought to impeach in any way Doherty's debentures. The debentures impeached are those of other persons, Kennedy, Trower, and Churton. I need hardly say that the question raised here was not raised, argued, or decided in that suit. Had it been, and had it been decided in favour of Mr. Doherty, then, wholly irrespective of who were the parties to the suit, the matter decided would bind us and all Courts; but it would so bind, not as an estoppel, which depends on the parties to the suit, but as an authority—a judicial declaration of the law.

That the judgment in that suit may operate to create such an estoppel, i.e., to put the holders of the impeached debentures in the same position as Doherty, it must be shown that they were practically co-plaintiffs in that suit, and in my judgment that can

(1) [1912] 1 I. R. 349, 363; [1914] A. C. 823.

be done only by showing either (*a*) that that suit was in its frame a suit on behalf of the class of second debenture holders, or (*b*) that by agreement between these second debenture holders and the company it was agreed that the suit should determine their rights as well as that of the nominal plaintiff, or (*c*) that there was an order in the present suit to that effect.

Now the suit is not one on behalf of the second debenture holders as a class, nor could it have been, because one of the claims of the plaintiff was on foot of an alleged pledge of whiskey. Whether, however, it could or could not have been so framed is not material. As a matter of pleading it was not so framed. A suit by one of a class on behalf of himself and the other members of the class is a well-known form of action, and to be such it must be peculiarly framed, and Doherty's action was not so framed. Again, I find no evidence of an agreement by the second debenture holders as a class, that the decision therein should determine their rights; and thus we are brought to the ground on which Barton J. decided that the suit of *Doherty* v. *The Company* (1) was one, not on behalf of all the second debenture holders, but on behalf of Doherty and Kennedy. That decision is based on Doherty and Kennedy having applied for liberty to institute a *joint* action. That application, however, was not successful. The order was that Doherty alone might bring the action, and in an action brought under such a liberty the claim of Kennedy could not be, and in fact was not attempted to be, put forward for decision, nor was it in fact decided. I am at a loss to understand how the judgment in that action can operate to work any estoppel in favour of Kennedy that it did not work (as Barton J. has decided it did not work) in favour of Trower and Churton.

I have one other matter to mention. The judgments in the House of Lords in *Doherty* v. *The Company* (2) have been relied on, especially the judgment of Lord Parker of Waddington, as showing that, even if these debentures are bad, the holders are entitled to the benefit of the trust deed. But to decide that these

(1) [1912] 1 I. R. 349, 363; [1914] A. C. 823.

(2) [1914] A. C. 823.

Appeal. 1915.

Cox v. Dublin City Distillery (No. 2).

Palles C.B.

alleged debenture holders, who in our opinion were never the holders of valid debentures, are entitled to the benefit of the trust deed, would be to give the benefit of that deed to parties who were not cestuis que trust under it. To have the benefit of that deed it is essential that a person should be the holder of, I will not say a valid, but an enforceable, debenture. When the case in the House of Lords is examined, it is manifest that no such proposition as is suggested was laid down by Lord Parker. He was dealing with debentures which presumably were the subject of a valid agreement for their issue, and were validly issued, and the point relied on there against their validity was the non-performance of the subsequent act of registration, by which debentures originally valid ceased to fill that character. The decision cannot affect the present case.

I am, therefore, on the whole case, of opinion that the judgment of Barton J. should be affirmed, save so far as relates to the debentures that were issued to the late Mr. Kennedy. I hold that these were originally invalid, and that the decision in *Doherty* v. *The Company* (1) does not estop the parties from raising the question.

Molony L.J. :—

The Dublin City Distillery Company was incorporated in the year 1890, for the purpose of carrying on the business of whisky distillers in Dublin and elsewhere in Ireland.

The capital of the Company was £115,000, and by the articles of association power was given to the Company to raise or borrow money for the purposes of the Company on any bond or debenture, payable to bearer or otherwise, and at such rate of interest, and repayable in such manner, and generally upon such terms in every respect, as the directors should determine.

Article 50 of the articles of association provided that the directors might, without the sanction of a general meeting, from time to time create and issue debentures at a premium, or discount, or at par, and borrow money on same, or might borrow money by mortgage of the Company's assets and effects, including its

(1) [1912] 1 I. R. 349, 363 ; [1914] A. C. 823.

uncalled capital, or otherwise, at any time, and in any form or manner, and for such amount, and for such purposes of the Company, as the directors at a board meeting might from time to time determine.

In September, 1890, £35,000 was raised by the issue of 350 first debentures of £100 each.

On the 5th October, 1895, the directors authorized the creation and issue at par by the Company of £25,000 in second mortgage debentures, in sums of £10 each, and multiples of ten, bearing interest at the rate of 5 per cent. per annum, to be paid on the 31st May and 30th November in each year. These debentures were secured by a trust deed, dated the 9th November, 1895, and made between the Company of the one part, and William Findlater and Frederick Hans Kennedy of the other part, whereby certain freehold and leasehold properties of the Company were conveyed to the said William Findlater and Frederick Hans Kennedy to secure the repayment of the said debentures.

Second debentures to the amount of £13,570 were taken up at par, leaving debentures to the amount of £11,430 unissued.

The directors, in 1903, proceeded to deal with the balance of the second debenture issue, and at meetings held by them on the 12th May and 16th May, 1903, and 20th January, 1904, certain resolutions were passed, the legal effect of which is the first question to be determined in this appeal.

Article 93 provides that the Company may make contracts with any of its directors upon such terms as the directors shall think fit, but by article 94 no director shall vote in respect of any contract or matter in which he is individually interested otherwise than as a member of the Company. Under article 109 of the articles of association the quorum of directors necessary to be present at meetings was fixed at two.

At the time in question Frederick Kennedy, Edward Doherty, A. J. W. Howes, P. V. Churton, and P. B. Trower were the directors of the Company.

At the meeting of the 12th May, 1903, Kennedy, Doherty, and Howes were present, and a resolution was passed that in consequence of advances made by Frederick Kennedy and Edward Doherty to the distillery for the purpose of carrying on the

Appeal. 1915. Cox v. Dublin City Distillery (No. 2). Molony L.J.

business, second debentures to the amount of £4000 should be issued to Frederick Hans Kennedy, as trustee for the said Frederick Kennedy and Edward Doherty, the understanding being that, when all advances made by the said Frederick Kennedy and Edward Doherty were paid, with 5 per cent. interest, the debentures should be re-transferred to the Company.

The case of *In re Greymouth Point Elizabeth Railway and Coal Co., Ltd., Yuill* v. *Greymouth Point Elizabeth Railway and Coal Co., Ltd.* (1), decides that quorum in articles of association means a quorum competent to transact and vote on the business before the board, and therefore that a resolution passed at a meeting of three directors, two of whom were interested in the subject-matter of the resolution, was invalid. This case is directly in point, and I agree with Barton J. in holding that the resolution of the 12th May, 1903, was invalid, it having been passed by three directors, two of whom were interested parties.

At the meeting of the 16th May, 1903, the whole five directors were present, and each of the directors agreed to advance a certain sum on account of proposed expenditure on new plant, and the resolution then passed provided that as security for such advances £4,000 second debentures should be handed to Frederick Hans Kennedy, as trustee for those making the advances, £100 debentures to be held against each £50 to be advanced, and on the understanding that when all such advances should be repaid, with interest at 5 per cent. per annum, the debentures should be re-transferred back to the company.

This resolution was also invalid, every director present being interested in the contract.

These debentures were sealed at a meeting of the directors held on the 25th June, 1903, at which Doherty and Howes were the directors present, and it was argued with much force by Mr. Wilson K.C. that the debentures which were then issued in trust for Messrs. Churton and Trower were good, because they were not present at the meeting of the 25th June, 1903. The resolution of the 25th June, 1903, however, was not an inde-

(1) [1904] 1 Ch. 32.

pendent resolution, as it expressly states that the debentures were signed and sealed "as per resolution of 16th May, 1903, and as securities for advances to be made to provide the new yeast-plant."

Mr. Wilson also contended that the resolution of the 20th January, 1904, was good, because his clients were not present, and that there were three directors; but unfortunately two of the three directors took debentures under the resolution, and consequently there was no valid quorum.

I cannot, therefore, yield to Mr. Wilson's contention.

At the meeting of the 20th January, 1904, Messrs. Kennedy, Doherty, and Howes were present, and it was resolved that thirty-four second debentures of £100 each, and three debentures of £10 each, be handed to Frederick Hans Kennedy, as trustee for those making otherwise unsecured advances to the distillery in connexion with the new yeast-plant, and carrying on the business, and on the same terms as provided for in the minutes of the 12th and 16th May, 1903. As before stated, Messrs. Kennedy and Doherty being present at this meeting, there was no valid quorum.

Mr. Healy K.C., on behalf of the representatives of Frederick Kennedy, contended that the action of Edward Doherty against Frederick Hans Kennedy, William Findlater, and the Dublin City Distillery Co., Ltd. (1), was a test action brought by Edward Doherty for the joint benefit of Frederick Kennedy and himself, and that he is entitled to rely upon the decision of the House of Lords, holding that the plaintiff in that action was entitled to a valid lien on the debentures for the amount of his advances to the extent of the property comprised in the trust deed. It appears that on the 12th March, 1909, an application was made by Edward Doherty and Frederick Kennedy in this matter, that they might be at liberty to institute an action against the trustees for the second debenture holders and the defendant company for the purpose of establishing the rights of the said Edward Doherty and Frederick Kennedy as pledgees of certain whiskies, and as chargeants upon certain second

(1) [1912] 1 I. R. 349, 363; [1914] A. C. 823.

Appeal.
1915.
Cox
v.
Dublin City Distillery (No. 2).
Molony L.J.

debentures. An affidavit was made by Mr. Doherty in support of the application, and on the 27th April, 1910, an order was made giving Edward Doherty liberty to proceed with such an action. Edward Doherty then commenced an action in his own name, and purporting to be on his own behalf, and ultimately obtained a decision in his favour from the House of Lords as regards the debentures.

There was no agreement, in fact, that the action should be treated as a test action. The action could have been brought by Mr. Doherty suing on behalf of himself and all other second debenture holders, or, if actions had been brought by several plaintiffs claiming the same relief, an order could have been made by the Court allowing one action to proceed as a test action, and staying the others: *Amos* v. *Chadwick* (1); *Bennett* v. *Lord Bury and Others* (2). No such course was, however, adopted in the present case.

The decision in Doherty's action is, of course, binding and conclusive on the parties to the record, but the debentures here are impugned by other debenture holders of the same class, and they are entitled to show that the debentures were not validly issued.

It has been pointed out that the trustees for the second debenture holders were parties in the action; but it is clear that trustees will not be deemed to represent the interest of absent cestuis que trust on any contention amongst the cestuis que trust *inter se*, but only where the contention is between a stranger and all the cestuis que trust: *Hamond* v. *Walker* (3).

My opinion is, therefore, quite clear that there is no estoppel.

The case of Mr. Adam Findlater and Mr. William Findlater stands upon a different basis. Mr. Adam Findlater was a director of the company up to 1899, and he then ceased to take any part in the management of the company. Mr. William Findlater was a trustee of the deed of the 9th November, 1895, for the second debenture holders, but was never a director, and never took any part in the management of the company. I therefore

(1) 4 Ch. D. 869.
(2) 5 C. P. D. 339.
(3) 3 Jur. (N. S.) 686.

agree with Mr. Justice Barton that they were both in the position of outsiders, to whom notice of the board's minutes could not be attributed. In the case of the *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company* (1) the directors of a joint-stock company had power under their articles to fix the number of directors which should form a quorum, and by a resolution they fixed three as a quorum. A meeting of the directors, at which two only were present, authorized the secretary to affix the company's seal to a mortgage, which was accordingly done by the secretary in the presence of the same two directors, and it was held that as between the company and the mortgagees, who had no notice of the irregularity, the execution of the deed was valid.

The only difference between that case and the present one is that here the number two is fixed by the articles, and there the articles empowered the directors to fix the number, and the directors by resolution had fixed the number at three. Lindley L.J. said :—"Here the directors may make any quorum they like—it may be two or it may be three. They did apparently appoint three. The mortgage in question is under the seal of the company, signed by two directors, and countersigned by the secretary. Now, what could anybody think of that? What is there to put them upon inquiry? What is there to give them notice of anything irregular, if there was anything irregular? If a person looked at the deed and looked at the articles, he would not see anything irregular at all; he would be at liberty to infer, and anyone in the ordinary course of business would infer, that if the directors had appointed a quorum they appointed the two who signed that deed. But supposing that three were wanted, he is not bound to go and look at the directors' minutes; he has no right to look at them except as a matter of bargain. The directors' minutes, unless he knows what they are, do not affect him at all. There is nothing irregular on the face of the deed even taken with the articles—there is nothing illegal in it." The Messrs. Findlater were not affected by the minutes of which they had no notice, and advanced their money bona fide on the faith of debentures which it was *intra vires* the company to issue, and which the company did

(1) [1895] 1 Ch. 629.

Appeal. 1915 Cox *v.* Dublin City Distillery (No. 2). Molony L.J.

in fact seal and deliver. I am therefore of opinion that the order of Barton J. should be affirmed as regards the Findlaters, the representatives of Churton, and the representatives of Trower, and reversed as regards the representatives of Kennedy.

Solicitors for William Carroll, George Richardson, and Patrick J. Gaynor: *G. D. Fottrell & Sons.*

Solicitor for the liquidator: *Robert Dickie.*

Solicitors for the representatives of Frederick Kennedy, the representatives of P. B. Trower, and the representatives of P. V. Churton: *Frederick Kennedy & Sons.*

Solicitors for William Findlater and the representatives of Adam S. Findlater: *Hoey & Denning.*

Solicitors for the trustees of the trust deed to secure second debentures: *Hoey & Denning.*

J. G. T.

Appeal. 1915. June 10, 25.

In re CUNNINGHAMS, Infants (1).

Practice—Jurisdiction to make Orders as to Guardianship and Maintenance of Infants on Originating Summons—All Originating Summonses in Minor Matters now assigned to Lord Chancellor—Order V, Rule 2—Order LV, Rule 3 (7), (8), (9).

There is jurisdiction upon an originating summons to make an order as to the guardianship and care, maintenance or advancement, of infants, and thereby to make them wards of Court.

In future all originating summonses in minor matters or relating to the property of minors, brought under Order LV, Rule 3 (7), (8), (9), will be assigned to the Lord Chancellor, subject, however, to the provisions of Order V, Rule 2 (*k*).

Appeal from an order of the Master of the Rolls refusing to grant an application by originating summons for the appointment of a guardian of the estates of infants, and an order as to the support, maintenance, and education of the infants.

(1) Before O'Brien L.C., and Ronan and Molony L.JJ.

The following statement of the facts is taken from the judgment delivered by Molony L.J. :—

"This is an appeal from an order of the Master of the Rolls, dated the 9th day of February, 1915, by which he declined to make an order on the application of Reginald Cunningham and Sheila Cunningham, by Phoebe W. Cunningham, the mother of the said Sheila Cunningham and the step-mother of the said Reginald Cunningham, and the next friend of both the said infants, that she, the said Phoebe W. Cunningham, be appointed guardian of the estate of the said infants, and for such order as to the support, maintenance, and education of the said infants as the Court might deem right. It appears from the affidavit of Mrs. Cunningham that the two infants are the children of her late husband, John A. Cunningham, who died intestate in April, 1911, at Lahore, in the Punjab Province of British India.

"The assets of the deceased are valued at £6000, and are all in India. Mrs. Cunningham in her affidavit expresses her desire that the estate of her late husband, so far as it has been realized, should be transferred to this country, and that proper steps should be taken to have the income of the shares to which the infants are entitled made available for their support, education, and maintenance.

"The application was brought on summons under Order 55, Rule 3 (9), and the Master of the Rolls declined to make any order, on the ground that if he appointed a guardian he must assume the care and management of the infants' property, and depart from the usual practice of having infants made wards of court on petition to the Lord Chancellor."

Megaw, for the appellant :—

The application was properly brought by originating summons before the Master of the Rolls: O. LV, r. 3 (9); O. V, r. 2 (*a*) (*b*). This course was adopted in this country in *In re Pavitt* (1), where, as in the present case, the infant had no property except personal estate in a foreign country, and is the practice in England under a similar rule to ours: Annual

(1) [1907] 1 I. R. 234.

Appeal. 1915.

In re CUNNINGHAMS, INFANTS.

Practice, 1915, p. 1014; *In re Willoughby* (1). If it was considered that it would be more convenient that the case should be dealt with by the Lord Chancellor, an order for transfer could have been made under the provisions of Order XLIX, Rule 3.

The jurisdiction in case of infants was originally in the Court of Chancery, acting on behalf of the Crown, as being the guardian of all infants: *The Queen* v. *Gyngall* (2), per Lord Esher M.R., at p. 239. Prior to the Judicature Act the proceedings to bring a minor under the guardianship of the Court must have been brought either by a bill, a cause petition, or by a summary petition: Reilly on Summary Petitions, p. 27. The General Orders of 1867, Order 4 (1), provided that all petitions in minor matters originated by summary petitions should be attached to the Court of the Lord Chancellor. By the Judicature Act (Ireland), 1877, s. 36, sub-s. 5, all causes and matters for the purpose of the wardship of infants and the care of infants' estates were assigned to the Chancery Division.

The Lord Chancellor, therefore, exercises this jurisdiction only as a judge of the Chancery Division. By the rules of December, 1877, made under the Judicature Act, it was provided that applications for the appointment of guardians of the persons and fortunes of infants might be made at chambers, and also orders as to the care, maintenance, or advancement of infants being wards of court, or as to the management of their property, whether under the general jurisdiction of the Court, or any statute specially authorizing the same. The rules of 1877 did not purport to repeal the former rules. By an order of the Lord Chancellor of the 9th April, 1878, it was directed that all originating summonses should be distributed equally between the Master of the Rolls and the Vice-Chancellor, and that all originating petitions in minor matters, and matters relating to the property of minors, should be transmitted to the secretary of the Lord Chancellor. New rules were made in 1891. The rules of 1891 expressly annulled the orders and rules mentioned in Appendix R, which included all rules of procedure of the High Court of Chancery made before the commencement of the Judicature Act of 1877, and all rules of

(1) 30 Ch. D. 324. (2) [1893] 2 Q. B. 232.

the Supreme Court made since the commencement of that Act, with certain exceptions not material here. Order LV, Rule 3, of those rules provided that the business to be disposed of at chambers by the judges of the Chancery Division should consist of the matters set out in the rule, including (11) applications as to the guardianship and care, maintenance or advancement, of infants. Order V, Rule 2, contained provisions as to the distribution of originating summonses and originating petitions, similar to those in the order of the Lord Chancellor of the 9th April, 1878. The rules of 1891 were annulled by the rules of 1905. But Order LV, Rule 3 (9), is similar to Order LV, Rule 3 (11) of the rules of 1891, and Order V, Rule 2 (*a*), (*b*), provides that every matter commenced by originating summons shall be assigned to a judge of the Chancery Division, other than the Lord Chancellor and the Land Judge. [Ronan L.J.: The rules of 1905 repeal the rules of 1891. Is not the effect of that to repeal the annulling provision in those rules, and revive the former procedure so far as not inconsistent with the present rule? Sect. 11 of the Interpretation Act, 1889, does not apply to rules of Court. By sect. 67 of the Judicature Act the former procedure is preserved where not inconsistent with the Act or rules of Court made under it.] The present rules were intended to form a complete code, superseding the former procedure. [He also referred to the Guardianship of Infants Act, 1886; Order LXXIII, Rule 2.]

Cur. adv. vult.

The judgment of the Court was delivered by

MOLONY L. J.

[His Lordship, after stating the facts as set out above, proceeded]:—The jurisdiction of the Court of Chancery in minor matters has been exercised from time immemorial. "It was," as stated by Lord Esher M.R., in the case of *The Queen* v. *Gyngall* (3), "a paternal jurisdiction, a judicially administrative jurisdiction, in view of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent."

(1) [1893] 2 Q. B. 232, at p. 239.

Appeal. 1915. *In re* CUNNINGHAMS, INFANTS. Molony L.J.

The usual mode of invoking the jurisdiction was by means of a summary petition: *Ex parte Mountfort* (1); *Ex parte Starkie* (3). In Ireland such petitions were attached to the Lord Chancellor (4th General Order, 31st October, 1867); and were called Originating Petitions (6th General Order, 2nd December, 1868).

Under sect. 36 (5) of the Judicature Act, there was assigned to the Chancery Division of the High Court (*inter alia*) the wardship of infants, and the care of infants' estates; and by sect. 67, save as by the Act or by any rules might be otherwise provided, all forms and methods of procedure which at the commencement of the Act were in force under and by virtue of the existing law, might continue to be used and practised.

Rules under the Judicature (Ireland) Act, 1877, were first made in December, 1877. They did not purport to interfere in any way with the exercise of the jurisdiction by petition, but Order LIII, Rule 2, provided that certain applications might be made at chambers in the Chancery Division, and these included applications for the appointment of guardians of the persons or fortunes of infants (Order LIII, Rule 2 (23)), and for directions or orders as to the care, maintenance, and advancement of infants being wards of Court, or as to the management of their property, whether under the general jurisdiction of the Court or under any statute specially authorizing the same (Order LIII, Rule 2 (24)).

There being no rule providing for the distribution of business assigned to the Chancery Division, it became necessary for the Lord Chancellor to make regulations for that purpose; and, accordingly, on the 9th April, 1878, the Lord Chancellor directed that the Clerk of Records and Writs should transmit to the Secretary of the Lord Chancellor all originating petitions in minor matters, and also any matters relating to the property of minors, including settlements on their marriage under 18 & 19 Vict. c. 43, and 23 & 24 Vict. c. 83, and all other petitions which are required by statute or otherwise to be heard by the Lord Chancellor, and that the same should, unless and until the Lord Chancellor should otherwise direct, be assigned to the Lord Chancellor, and that all other

(1) 15 Ves. 445. (2) 3 Sim. 339.

originating petitions should be distributed equally between the Master of the Rolls and the Vice-Chancellor, and should be marked for such Judges alternately by the Clerk of Records and Writs.

The rules came to be revised in 1891, and the regulations of the Lord Chancellor of the 9th April, 1878, were incorporated in the new rules (Order V, Rule 2), but the rule was expressly declared to be "subject to the power of transfer . . . and subject also to the power of the Lord Chancellor by order from time to time otherwise to direct." Order V, Rule 2, also provided that where the commencement is by originating summons, it is the duty of the officer issuing such summons to mark the same for the Judges of the Chancery Division other than the Lord Chancellor, alternately, according to a rota. Order LV, Rule 3 (9), of the rules of 1891, provided for "applications as to the guardianship and care, maintenance or advancement, of infants," being made at chambers, and is substituted for Order LIII, Rule 2 (23), (24), of the rules of 1877. The English rule, Order LV, Rule 2 (12), is the same, except that it omits the word "care." Under this rule minors are made wards of Court, and full jurisdiction exercised over their affairs, in England, without any petition. The rules in Ireland were again revised in 1905, but so far as concerns this case the rules of 1891 and our existing rules are identical. The result is that in England a minor can always be made a ward of Court on an originating summons, while in Ireland the application can be made either by petition to the Lord Chancellor as provided for by Order V, Rule 2, or by originating summons under Order LV, Rule 3 (9), which, under the existing rules, will be allocated to a Judge of the Chancery Division according to the rota.

The practice hitherto has been that, if the estate of the minor is to be managed by the Court, a petition is brought, as accounts can be taken and inquiries made more expeditiously and conveniently in the chambers of the Lord Chancellor, who is provided with a special staff for the purpose of administering his jurisdiction in minor matters; but if it is desired that a direction should be given on a particular point only, or a guardian appointed for a specific and limited purpose, the application is made on an originating summons: *In re Pavitt, an Infant* (1). We are quite satisfied

(1) [1907] 1 I. R. 204.

Appeal. 1915.

In re CUNNINGHAMS, INFANTS.

Molony L.J.

that there is full jurisdiction to make any order as to the guardianship and care, maintenance or advancement, of infants on an originating summons, and thereby to make them wards of Court.

In the present case accounts and inquiries will be necessary, and directions will have to be given for the maintenance and education of the minors, and for the realization and management of their property. We agree with the Master of the Rolls that he had jurisdiction to make the order, and we also agree with him that the matter can more appropriately be disposed of before the Lord Chancellor. It seems to us, however, that the best course to have adopted in the circumstances would have been to transfer the matter to the Lord Chancellor under Order 49, Rule 3, subject to his consent being first obtained.

It is, in our opinion, desirable that all originating summonses in minor matters, or relating to the property of minors, should be heard and disposed of by the Lord Chancellor, and we have no doubt that the Lord Chancellor can, if he thinks fit, make an order under the power reserved to him by Order 5, Rule 2, directing such summonses to be heard before himself.

In the present case the order will be that the order of the Master of the Rolls be discharged, and that in lieu thereof the matter be transferred to the Lord Chancellor (he so consenting), and that the applicants be at liberty to apply to the Lord Chancellor for the costs of the hearing before the Master of the Rolls, and of this appeal.

Solicitor for the appellant: *J. H. Peden.*

J. G. T.

NOTE.—The Lord Chancellor has made the following order:—

I, the Right Hon. Ignatius J. O'Brien, Lord Chancellor of Ireland, in pursuance of the powers reserved to me under Order V, Rule 2, of the Rules of the Supreme Court (Ireland), 1905, and of all the powers hereunto me enabling, hereby order and direct that the Clerk of Records and Writs shall transmit to my secretary all originating summonses in minor matters, or relating to the property of minors, brought under Order LV, Rule 3 (7), (8), (9), and the same shall be assigned to me, and shall be so marked by the Clerk of Records and Writs, subject, however, to the provisions of Order V, Rule 2 (*k*), of said Rules of the Supreme Court.

Dated, *25th June*, 1915.

IN THE MATTER OF THE ESTATE OF MATTHEW HENRY FRANKS.

Wylie J.
1914.
June 30.
July 7.
Appeal.
Dec. 11, 14, 21.

Settlement—Grant by Settlor of Rentcharge de novo, *to Trustee and his Heirs in trust for Persons in Tail—Ultimate Remainder to Use of Settlor to attend Inheritance—Effect of barring Entail.*

A, the tenant in fee-simple of certain lands, granted a rentcharge issuable out of the lands to a trustee and his heirs upon trust for successive tenants in tail with ultimate remainder to the use of A, his heirs and assigns, to attend upon the inheritance or be disposed of as A, his heirs and assigns, should think proper.

Held, by the Court of Appeal, affirming the decision of Wylie J., that an equitable tenant in tail in possession could, by a valid disentailing assurance, bar the subsequent limitations, and thereby acquire for himself an absolute equitable estate in fee-simple in a perpetual rentcharge.

Chaplin v. *Chaplin*, 3 P. Wms. 229, and *Drew* v. *Barry*, I. R. 8 Eq. 260, considered.

MOTION by the vendor by way of objection to the final schedule of incumbrances, claiming that a rentcharge of £200 (Irish), affecting the purchase-money of the lands sold in this matter, which had been ordered to be redeemed as a perpetual rentcharge at the sum of £4,450, was terminable, and could not be prolonged beyond the existence of the issue of Francis Kearney.

By an indenture made the 30th March, 1813, between Thomas Rochfort of the first part, Francis Kearney of the second part, and John Cuthbert, junior, of the third part, after reciting that it was the intention of Thomas Rochfort to make a provision for Francis Kearney and his brother, James Kearney, by charging part of the lands of which James Kearney died seised, and now in the possession of Thomas Rochfort, with a yearly rentcharge of £200 to be issuable and payable to Francis Kearney for and during the term of his natural life, with remainder to the children or child of Francis Kearney as thereinafter mentioned, and in case of no such children or child, or that James Kearney the brother of Francis should survive Francis Kearney, then that the rentcharge

Wylie J. 1914. *In re* FRANKS'S ESTATE.

of £200 should continue and be paid to James Kearney and his children or child in manner thereinafter mentioned, and in case there should be no children or child of Francis Kearney or James Kearney, his brother, or being such, and that all such children or child should die before they could respectively take under the limitations thereinafter mentioned, then, in either of such cases, it was thereby intended that, after the death of the survivor of them Francis Kearney and James Kearney, the rentcharge of £200 should cease and determine and sink into and merge in the freehold and inheritance of the lands and premises thereinafter mentioned, to and for the use, benefit, and behoof of Thomas Rochfort, his heirs and assigns, or to be disposed of in such manner as Thomas Rochfort, his heirs or assigns, might think proper, it was witnessed that in order to make such provision for Francis Kearney and his children or child as aforesaid, and for the consideration therein mentioned, Thomas Rochfort, for the purpose of providing a competent livelihood and provision for Francis Kearney during his life and his children or child lawfully begotten, and for settling and assuring the yearly rentcharge of £200 for this purpose, and to, for, and upon such uses, intents, and purposes and under and subject to such powers, provisoes, limitations, and agreements as were thereinafter expressed and declared of and concerning the same, he, Thomas Rochfort, did thereby grant unto John Cuthbert and his heirs one clear annual sum or yearly rentcharge of £200 of Irish value and currency charged and chargeable upon all that and those the lands of Park or Castlepark, in the barony of Courcy, and county of Cork, the yearly rentcharge or annual sum of £200 to be received, paid, and payable as therein mentioned, to hold the said rentcharge unto John Cuthbert and his heirs to the uses and upon the trusts and to and for the intents and purposes and under the provisoes, conditions, and limitations thereinafter expressed, limited, and declared, that is to say, to pay the full amount of rentcharge of £200 a year to Francis Kearney and his assigns for and during the term of his natural life by half-yearly payments upon the days thereinbefore mentioned, and from and after the decease of Francis Kearney then in trust to pay the full amount thereof to such children or child and the heirs of the body of such children

or child of Francis Kearney in such shares and proportions as Francis Kearney should by any deed in writing or by his last will appoint, and in case of no such appointment, the same to be paid amongst the children lawfully to be begotten of Francis, and the heirs of their bodies, share and share alike, if boys, at their respective ages of twenty-one years, and if girls at their respective ages of twenty-one years or days of marriage, whichever should first happen, with benefit of survivorship, and if but one child, whether male or female, the whole of the said rentcharge to be paid to such one child, if a son at the age of twenty-one, and if a daughter at the age of twenty-one or day of marriage, with such sum thereout for the maintenance of such children or child until such age or time of marriage as Francis should by any instrument appoint; and in case Francis Kearney should die without having such children or leaving such children, and that all such children or an only child of Francis Kearney should die before they, he, or she might be entitled to take under the aforesaid appointment or limitations, then and in such case John Cuthbert and his heirs should stand seised of the yearly rentcharge of £200, to the intent and purpose to pay the full amount thereof to James Kearney and his assigns during the term of his life, the same to be paid to him and them by equal half-yearly payments on the days thereinbefore mentioned for payment thereof, and from the decease of James Kearney to the use and behoof of the children or child of James Kearney, lawfully to be begotten, and the heirs of their bodies, in such shares and proportions as James Kearney should by any deed in writing or by his last will appoint; and in case of no such appointment, the same to be equally divided between such children and the heirs of their bodies, share and share alike, if boys to be paid to them at the respective ages of twenty-one years, and if girls at their respective ages of twenty-one years or days of marriage, whichever should first happen, with benefit of survivorship, and if but one child, whether male or female, the whole of the said rentcharge to be paid to such one child, if a son at the age of twenty-one, and if a daughter at the age of twenty-one or day of marriage, and the heirs of their bodies; and in case James Kearney should die without having such children, or leaving such children, and that all such children or an

Wylie J. 1914. *In re* FRANKS'S ESTATE.

only child of James Kearney should die before they, he, or she might be entitled to take under the aforesaid appointment or limitations, then and in such case John Cuthbert and his heirs should stand seised of the yearly rentcharge of £200 to the only use and behoof of Thomas Rochfort, his heirs, and assigns for ever, to attend upon the freehold and inheritance of the said lands, or be disposed of in such manner as Thomas Rochfort, his heirs, and assigns, should think proper. And after providing for distress and re-entry in case of non-payment, and the usual covenant for title, Thomas Rochfort for himself, his heirs, and assigns covenanted with John Cuthbert, his heirs, and assigns, that he Thomas Rochfort, his heirs, and assigns, and every other person claiming, or who should or might have any estate, right, title, claim, and demand whatsoever, either at law or in equity, of, into, or out of the said premises thereby charged with the payment of the annuity or yearly rentcharge of £200, and so granted as aforesaid, by, from, or under him, them, or any of them, should and would from time to time, and at all times thereafter, at the request of John Cuthbert and his heirs, and at the cost and charges in the law of Francis Kearney or James Kearney, and their assigns, as the case might be, make, do, acknowledge, levy, suffer, and execute all and every such further grant, act, deed, and thing in the law whatsoever for the future, better, more perfectly, and absolutely granting the annual sum or yearly rentcharge of £200, and for charging and securing the same upon, and to be issuing and payable for ever out of the said lands and premises charged therewith as aforesaid, for the better securing of the same in manner aforesaid, according to the tenor, true intent, and meaning of these presents as by John Cuthbert and his heirs, or Francis Kearney and James Kearney, or their assigns, should be reasonably required.

The said Francis Kearney died in 1854 without having exercised the power of appointment vested in him by the said indenture, leaving seven children him surviving, viz., Richard O'Kearney (otherwise Kearney), Francis O'Kearney (otherwise Kearney), James O'Kearney (otherwise Kearney), Mary O'Kearney (otherwise Kearney), Emily O'Kearney (otherwise Kearney), Victoria O'Kearney (otherwise Kearney), and Hatton O'Kearney (otherwise Kearney), all of whom attained the age of twenty-one

years. The said James Kearney, brother of the said Francis Kearney, died in February, 1858, without having had issue.

Each of the said children of the said Francis Kearney, with the exception of Francis O'Kearney, duly executed and enrolled a disentailing deed, purporting to bar their estates tail in their respective shares in the said rentcharge.

Richard O'Kearney died many years ago, leaving issue. Francis O'Kearney died in 1911, without having had issue. James O'Kearney died some years ago, leaving issue. Mary O'Kearney intermarried with Thomas H. Burke, and died leaving issue. It was unknown whether Emily O'Kearney was ever married or was still living. Victoria O'Kearney was never married, and was still living. Hatton O'Kearney died in 1904, leaving issue.

The interest of Thomas Rochford in the said lands of Park or Castlepark subsequently became vested in Matthew Henry Franks, who had sold them under the Land Purchase Acts.

The claimants appearing on the final schedule of incumbrances to the shares of Richard O'Kearney, James O'Kearney, Emily O'Kearney, Victoria O'Kearney, and Hatton O'Kearney, in the said rentcharge, were Elizabeth Mason and others, and the claimant to the share of Mary Burke was Augusta H. Burke.

By indenture dated the 8th April, 1899, Francis O'Kearney, in consideration of £800, conveyed his share in (*inter alia*) the said rentcharge to Hatton O'Kearney. The said indenture was not enrolled. By another indenture dated the 14th December, 1904, in consideration of £935, Hatton O'Kearney conveyed (*inter alia*) the same share to a trustee in trust for Matthew Henry Franks, the vendor.

By order of Mr. Justice Wylie, dated the 14th January, 1914, the said rentcharge had been redeemed at the sum of £4450, as a perpetual rentcharge.

Oulton K.C., for the vendor.

Norwood K.C., for Elizabeth Mason and others.

O'Byrne, for Augusta H. Burke.

The arguments were similar to those in the Court of Appeal, reported *infra*, p. 395.

Wylie J.
1914.

In re FRANKS'S ESTATE.

July 7.

WYLIE J.:—

In this case an objection has been lodged relating to claim No. 14 on the final schedule. This is a claim to a rentcharge of £200 a year, created by a deed of the 30th March, 1813. On the 14th March, 1914, that rentcharge was redeemed, on the application of the vendor, as a perpetual rentcharge, and the redemption price fixed at £4450. The vendor has since, however, filed an objection alleging that the rentcharge is terminable, and cannot be prolonged beyond the existence of the issue of Francis Kearney in the deed mentioned, and that none of the claimants are entitled to have their shares of the redemption price paid to them, but that the same should be retained in Court pending the failure of the said issue.

The provisions of the deed are very well summarized by the examiner at No. 13 on the schedule as follows:—By indenture dated the 30th March, 1813, and made between Thomas Rochfort, first part, Francis Kearney, second part, and John Cuthbert, jun., third part, reciting the intention of Thomas Rochfort to make a provision for Francis Kearney and James Kearney by charging part of his lands with a rentcharge for the said Francis Kearney during his life, with remainder to his children as therein, and, in case of none such, for James Kearney and his children, and in case of no children of Francis Kearney or James Kearney, or that all such should die before they would take, that the said rentcharge should cease and determine and sink into and merge in the freehold and inheritance of the said lands to and for the use and benefit of Thomas Rochfort, his heirs and assigns, or to be disposed of as he or they might think proper, Thomas Rochfort granted to John Cuthbert and his heirs a yearly rentcharge of £200 (Irish currency) to issue out of the lands of Castle Park, in the said estate, and to be held by him and them to the use and upon trust to pay the said rentcharge to Francis Kearney for his life, and after his decease to such children or child, and the heirs of the body of such children or child of Francis Kearney, in such shares as he should by deed or will appoint, and in case of no such appointment, to be paid amongst his children and the heirs of their bodies, share and share alike, at twenty-one, or twenty-

one or marriage, with benefit of survivorship, and if but one child, the whole to be paid to such one child at twenty-one, or twenty-one or marriage, and in case Francis Kearney should die without having such children, or that all such or an only child should die before they, he, or she might be entitled to take, to pay the said rentcharge to James Kearney during his life, and after his decease to the use of the children or child of James Kearney and the heirs of their bodies, in such shares as he should by deed or will appoint, and in case of no such appointment, to be equally divided between such children and the heirs of their bodies, share and share alike, to be paid at twenty-one, or twenty-one or marriage, with the benefit of survivorship, and if but one child the whole to be paid to such one child at twenty-one, or twenty-one or marriage, and the heirs of their bodies; and in case James Kearney should die without having such children, or that all such should die before they, he, or she might be entitled to take, to stand seised of the said rentcharge to the use of Thomas Rochfort, his heirs, and assigns, for ever, to attend upon the freehold and inheritance of the said lands, or to be disposed of in such manner as Thomas Rochfort, his heirs, and assigns, should think proper. There is also a covenant for further assurance of the rentcharge, as a charge for ever on the lands.

Now, whatever may be the effect of the limitations in the deed, I think it is clear, taking all its provisions together, that the deed created a perpetual rentcharge, and vested the legal estate therein in John Cuthbert and his heirs upon the trusts therein mentioned. As against this view, Mr. Oulton, for the vendor, referred to and relied upon the clause in the recital, that in case there should be no children or child of Francis Kearney or James Kearney, his brother, or being such, that all such children or child should die before they could respectively take under the limitations thereinbefore mentioned, then in either of such cases it was thereby intended that, after the death of the survivor of them, Francis and James Kearney, the rentcharge of £200 should cease and determine and sink into and merge in the freehold and inheritance of the lands for the benefit of Thomas Rochford, his heirs, and assigns, or to be disposed of as he or they should think proper. But that clause only indicates

Wylie J. 1914.

In re Franks's Estate.

an intention as to what should happen to the rentcharge in case none of the children of Francis or James Kearney should live to take, *i.e.*, should attain twenty-one or marry, and from it no inference of intention can be drawn as to what should become of the rentcharge in case such children attained twenty-one or married. Therefore, assuming that the deed created and vested in the grantee a perpetual rentcharge, as, in my opinion, it did, let us see in the events that happened what trusts took effect.

Francis Kearney, the first equitable tenant for life, died without making any appointment, leaving seven children, all of whom attained age. Thereupon, according to the limitations of the deed, each of his said children became equitable tenant in tail of a one-seventh share of the rentcharge. It would appear that all the children married except one, that each of them duly executed and enrolled a disentailing deed, except one Francis Kearney, who would appear to have died without issue, after having sold and assigned his share to his brother, Hatton Kearney, but the deed of assignment was not enrolled. Curiously enough, however, the vendor, in 1904, purchased this share from Hatton Kearney for £935, believing, I presume, that he was getting good title.

Now, the vendor contends that none of the children, by barring the entail, could acquire as against the lands more than a base fee in their shares determinable on the failure of their issue. But it seems to me that this rentcharge is "land" within the definition thereof in the Fines and Recoveries Act, and that any tenant in tail thereof could under that Act, by a proper deed duly enrolled, acquire the fee simple absolutely.

But even supposing this contention of the vendor were correct, what would be the result? Four of the children, it would appear, have died leaving children, and, as regards their shares, I would not retain them pending a failure of issue, but would value and redeem them, and the price would, as Mr. Oulton admits, be practically the same as the price of the fee. One died without issue, and the vendor has already acquired his share by purchase, or if not by purchase, by resulting trust. One is living and married, but so far has no children, and the redemption price of her share would depend on the particular facts. The other child

is still living, and is Superioress of a Convent, and the course that would probably be followed in this case would be to invest sufficient funds to pay her share of the rentcharge during her life, or buy an annuity of like amount. So that in any view of the case, the vendor could not gain much by his objection.

In my view, however, any of the children who duly disentailed acquired the fee simple of his or her share of the rentcharge; and it would appear, upon the facts as stated, that the only share upon which the vendor would have a claim, by way of resulting trust under the deed, is the share of Francis Kearney which the vendor has already purchased.

Having regard to this decision, the redemption order already made is right, and the examiner will have no difficulty in distributing the redemption price.

. E. W.

The vendor appealed (1).

Appeal. 1914. Dec. 11, 14, 21.

Oulton K.C. and *Meredith K.C.*, for the appellants:—

The rent should not have been redeemed on the basis of its being a perpetual rent, as when the entail in this rent, which was one created *de novo*, was barred, a base fee only was acquired. "There is this difference between an entail of lands and an entail of rent; that the tenant in tail of lands, with the immediate reversion in fee in the donor, may, by a common recovery, bar the entail and the reversion; whereas the grantee in tail of a rent *de novo*, without a subsequent limitation of it in fee, acquires, by a common recovery, only a base fee, determinable upon his decease, and failure of the issue in tail; but if there is a limitation of it in fee, after the limitation in tail, the recovery of the tenant in tail gives him the fee simple": Butler's note, Co. Litt., 1832 ed., p. 298a. "The reason of this difference is, that it would be unjust that the conveyance to a grantee of a rent should give a longer duration of existence to the rent than it

(1) In the Court of Appeal, before O'BRIEN L.C. and HOLMES and MORIARTY L.JJ.

Appeal. 1914.

In re FRANKS'S ESTATE.

had in its original creation": *Ibid.* The decision of Lord Chancellor Talbot in *Chaplin* v. *Chaplin* (1) rules the present case. There the legal estate in a rent created *de novo* by the settlement was vested in trustees in trust for one in tail, who died without issue, and it was held that the widow of the *cestui que trust* in tail was not dowable out of the rent. On the first argument of the case "the Court conceived that if such a rent *de novo* be granted in tail without any remainder over, and the tenant in tail suffers a recovery thereof, this recovery, though it will turn the estate tail into a fee, yet the same will pass but a determinable fee, which must end on the death of the tenant in tail without issue." *Smith* v. *Farnaby* (2) is an example of the exception that when in such a case there is a remainder over, the suffering of a common recovery by the tenant in tail of the rent gives him the estate. See also Burton's Real Property, 8th ed., pp. 348, 349. Here there is no remainder over in the events which happened. It is immaterial that the legal estate in the rent was vested in a trustee. See *Drew* v. *Barry* (3), where the Court of Appeal held the annuity there in question not to be perpetual. Christian L.J. there says (p. 281): "I have now to add, that even if the trustees retained the legal estate against rentcharges and ulterior *cestuis que use* alike, I should hold that the case would not be materially varied. The only difference would be that the rents, instead of being legal hereditaments, would be equitable hereditaments. Their quality of realty would be the same." The disability attaching to the tenant in tail of such a rent as this, created *de novo*, and without remainder over, could not be avoided by the conveyancing device of vesting the rent in the first place in trustees and their heirs, nor can it be assumed from the frame of the deed that the object of the settlor was to create a perpetual rent.

H. D. Conner K.C. and *Norwood K.C.*, for the respondent:—

We submit that Mr. Justice Wylie was right in holding the rent to be perpetual. It was clearly intended by the deed so to be, and can it be said that there is no conveyancing means by

(1) 3 P. Wms. 229.
(2) Carter, 52.
(3) I. R. 8 Eq. 260.

which such an intention can be carried out? The deed actually contains a covenant for further assurance of the rent, which was vested as a perpetual rent in the trustee and his heirs, upon the trusts named. We admit the general proposition as laid down in Butler's note, that a tenant in tail of a rent *de novo*, without remainder over, acquires on barring the entail only a determinable fee; he cannot enlarge the existence of the rent beyond its proper term, but this has no application to such a case as the present, where we find a perpetual rent created in the trustee and his heirs. Had the settlor executed two deeds, creating a perpetual rent by one, and subsequently settling it, could it be contended that the same result would follow? and if not, it is clear that what may be done by two deeds may be done by one. *Chaplin* v. *Chaplin* (1) adds nothing to the admitted principle of law as stated in Butler's note, and only decided that the widow of the equitable tenant in tail was not entitled to dower out of the rent. It is submitted that the question was never present to the minds of the Court in *Drew* v. *Barry* (2) at all, and no dictum in that case, where the annuities were legal rents by force of the Statute of Uses, can rule the present. In *Weeks* v. *Peach* (3), Holt C.J. held, "There may be a remainder of a rent *de novo*; for the intent of the party gives it first a being for the whole, and then the lesser estates are carved out of it." *In re Hutchins' Estate* (4) is in our favour. The clear intention of the deed should be given effect to: *Stinson's Estate* (5); *Tringham's Trusts* (6); *In re Oliver's Settlement* (7). As to the power of an owner of a prior equitable estate tail to bar an equitable estate in remainder, see *Brydges* v. *Brydges* (8), approved of in *Wykham* v. *Wykham* (9).

John O'Byrne, for Augusta H. Burke.

Oulton K.C. in reply:—

[Reference was also made to Jarman on Wills, 6th ed., p. 1153; Theobald on Wills, 7th ed., p. 500; Challis's Real Property, p. 346.]

(1) 3 P. Wms. 229.
(2) I. R. 8 Eq. 260.
(3) 2 Salk. 577.
(4) 19 L. R. Ir. 215.
(5) [1910] 1 I. R. 47.
(6) [1904] 2 Ch. 487.
(7) [1905] 1 Ch. 191.
(8) 3 Ves. Jun. 120.
(9) 18 Ves. 418.

Appeal.
1914.

In re FRANKS'S ESTATE.

O'BRIEN L.C. :—

This case involves a rather intricate question of real property law, such as nowadays we are happily not often confronted with, but owing to the very able and thorough arguments addressed to the Court by counsel on both sides, we do not consider it necessary to reserve judgment, and, indeed, in a case such as this, where an estate has been sold under the Land Purchase Acts, and the parties are awaiting the distribution of the purchase-moneys, the delay caused by a reservation of judgment would be clearly undesirable.

The question arises on an indenture of the 30th March, 1813, made between Thomas Rochfort, of the first part, Francis Kearney, of the second part, and John Cuthbert, of the third part. [His Lordship referred to the provisions of the deed, and continued.]

If I were at liberty to decide this case upon the evidence of the settlor as disclosed by the terms of the deed itself, I should have thought that the document was framed in such a manner that the result which is contended for by Mr. Oulton should be avoided. We may reasonably presuppose that the draftsman of the deed was aware of the rules of feudal law relating to rentcharges, and was not ignorant of the feudal principle that the grantee in tail of a rent created *de novo*, without a subsequent limitation of it in fee, acquires by a common recovery only a base fee determinable upon his decease and failure of issue in tail. We may also assume that he was equally well aware that if there was a limitation of it in fee after the limitation in tail, the recovery by the tenant in tail gave him the fee simple ; and that if the rent was not a rent *de novo*, the rule also was different, and that the grantee in tail of such a rent could, by suffering a common recovery, acquire the fee.

I think it also not unreasonable to assume that in modern times a conveyancer might think it desirable, by some legitimate device, to prevent the operation of the strict feudal rule, and, if possible, while creating by one instrument a rent *de novo*, to limit it by another, so that the rent should be in fact on the same basis as if it were in every way a fee simple. If the intention was not to bring about such a result, one would expect that the rent

de novo would be created in such a way that it would vest in the successive grantees by force of the Statute of Uses, reserving only estates tail, and so, that if a tenant in tail should be disposed to bar the entail, he could only do so to the limited extent of creating a base fee. But, as I have said, if the conveyancer desired to bring about a different result, he would naturally, if it could be legally done, resort to the device of creating a rentcharge in fee simple in one set of persons as trustees, and then by another deed operate upon this rentcharge so created as if it were a rentcharge *in esse*. That is in effect what this deed has done. I put it to Mr. Oulton, in the course of his very able argument, whether if such a proceeding was operative in the case of two separate deeds, it could make any difference in the present state of conveyancing that it was done by one deed. I did not understand Mr. Oulton to contend that it made any difference, but he contended that the purpose could not be effected at all; that it was immaterial whether the rentcharge was created by one deed and settled by another, or created and settled by the same deed; and that the rule of feudal law operated on the equitable estate created by the trust just in the same way as it would have operated upon a single legal rent created *de novo*. He also suggested that no inference could in fairness be drawn from the form of the deed, and that it would be equally legitimate to conclude that what the draftsman had in his mind was the necessity of guarding against the difficulties which might have arisen, in the settlement of lands themselves, in 1813, when it was essential to have an estate always preserved in continuity in trustees.

Now I have searched all the old books of conveyancing to which I have had access, and I invited Mr. Oulton to refer me to anything which would support this latter view, but I have failed to find any support for it. At the same time, this only enables me to say, what I think I can legitimately say, that I am at liberty to assume that the intention of the draftsman might have been what I have suggested this deed shows that it was. However, whatever the draftsman may have intended, such intention must be inoperative if the argument pressed upon the Court is well founded, namely, that by no possible means could the deed have such an effect as I consider it has, even though this rentcharge was vested in the

Appeal. 1914. *In re* FRANKS'S ESTATE. O'Brien L.C

trustee and his heirs in form perpetual. The rent was unquestionably redeemed by Mr. Justice Wylie on the basis of its being perpetual, and in point of fact it is difficult to understand how, when Mr. Justice Wylie came to redeem it as a rent, he could have redeemed it on any other basis.

It was argued in the strongest way, both before Mr. Justice Wylie and in this court, that the present case is ruled in the appellant's favour by clear and indubitable authority. The authority, if authority it be, is to be found in *Chaplin* v. *Chaplin* (1). So far as it has relation to the matter before us, it appears that the case was first argued before Lord Chancellor Talbot on this supposed state of facts: "The Lady Hanby, the grandmother of Porter Chaplin, being seised in fee, conveyed divers lands to the use and intent that certain trustees in the deed named should receive and enjoy a rentcharge of £30 *per annum*, to them and their heirs, with power to distrain for the said rent, and to enter and hold the land on non-payment for forty days; and then the said rent was to be to the use of Porter Chaplin in tail male, remainder to the use of the same persons that had the land in fee. Porter Chaplin, to whom this estate tail was limited in the rent, died, leaving issue Sir John Chaplin, who inter-married with the plaintiff, the Lady Chaplin, and afterwards died without issue male. Whereupon one question was, whether the plaintiff, the Lady Chaplin, was dowable of this rent of which her husband died seised in tail male." On this argument of the case, as in the subsequent argument arising out of the same matter, the only question argued was whether the Lady Chaplin was dowable out of this rent, and the decision of the Court is clear—"The Court held that, supposing this were a rent created *de novo*, the remainder whereof was extinguished by a limitation of it to those that had the land, such rent being determined by the death of the husband tenant in tail, and having no longer any existence, the wife cannot be endowed of that which is not in being; but that it is otherwise where tenant in tail of *land* marries and dies without issue, whereby that estate-tail is determined; for the wife in that case shall be endowed notwithstanding, because the land is in being, though

(1) 3 P. Wms. 229.

the estate tail therein is determined, and the dower is in some respects a continuance of the estate tail" (pp. 229–30). It was also clearly decided "that if such a rent *de novo* be granted in tail without any remainder over, and the tenant in tail suffers a recovery thereof, this recovery, though it will turn the estate tail into a fee, yet the same will pass but a determinable fee, which must end on the death of the tenant in tail without issue, for the grantor never agreed to charge the land any further with the rent, and it would be a wrong to the terre-tenant to burthen his estate with the rent for any longer time. See 2 Lutw., 1225."

So far as this first argument of *Chaplin* v. *Chaplin* (1) is concerned, it decided nothing except these clear propositions, which had apparently been reiterated before, but were given point to in that particular claim for dower; it, however, left undecided the question as to what the law would be as to dower in a case where the rent was kept alive, so far as it could be kept alive, in trustees and their heirs, and where the equitable estate only was limited by way of a succession of estates tail with ultimate remainder as the settlor might determine.

The case was, however, a second time argued before the Court, and it is the decision in the second argument which has been so strongly pressed upon us as conclusive against the judgment of Mr. Justice Wylie. If, however, apart from the notes of commentators, we take the case as it is reported, it appears to me to be equally clear as to what was decided in the second argument, and the decision appears to me to be equally inapplicable to the question now in issue. It is stated that, subsequent to the first argument, "it was disclosed to the Court that the legal estate of the rent in fee was in trustees, in trust for Porter Chaplin in tail male; and that, on his dying, the trust of this estate tail descended to his only son, Sir John Chaplin, in tail, the husband of the plaintiff, the Lady Chaplin, who (*inter al*') brought her bill for her dower of this rent; and then the case was no more than whether the wife of a *cestui que trust* in tail should be endowed." An argument of some ingenuity seems to have been addressed to the Court in favour of the

(1) 3 P. Wms. 229.

Appeal. 1914. *In re* FRANKS'S ESTATE. O'Brien L.C.

possibility of holding that, on the assumption on which the case was then argued, although the husband's estate was only an equitable interest, dower might be payable in respect of it, and, as I understand it, that in this event the feudal principles which required a decision against the widow on the first argument might not apply; but the judgment of the Court, after a most careful review of all the cases then to be found on the subject, decided that none of them could be relied on as an authority for holding that dower was payable in respect of an equitable estate, whether it was an equitable estate in land or an equitable estate in rent. In conclusion, the Lord Chancellor said "that there did not appear to be so much as one single case where, abstracting from all other circumstances, it had been determined there should be dower of a trust. For which reason, his Lordship dismissed the bill as to such part of it as claimed dower of the trust of this rent."

I am unable to discover anything in that case except a decision that, even though the subject-matter of the trust was a rent and not land, dower could not be claimed out of it. So much for *Chaplin* v. *Chaplin* (1) itself. It has, however, been urged most strongly that the case has been understood in a different light by different commentators, and, above all, by Butler in his Notes to Coke on Littleton. For simplicity of reference I take the passage as it appears at page 298A of the edition of 1832. Now I do not read this note in the sense pressed upon us. In the first portion of the note, *Chaplin* v. *Chaplin* (1) is cited, with other cases, as an authority for the general proposition that the grantee in tail of a rent *de novo* without subsequent limitation on it in fee acquires, by a common recovery, only a base fee. The reason for this is then given—"a rentcharge was supposed to be against common right, the grantee of the rentcharge being subject to no feudal services, and being a burthen upon the tenant who was to perform them. Upon this principle the law, in every instance, avoided giving by implication a continuance to the rent beyond the period expressly fixed for its continuance." The author then takes up as an example the case of the widow of a tenant-in-tail, pointing out the difference between the case

(1) 3 P. Wms. 229.

of the widow of a tenant-in-tail of land and that of the widow of a tenant-in-tail of rent created *de novo*, but referring solely to the case of a legal rent. Then follows a further reference to the case of *Chaplin* v. *Chaplin* (1), but, as I read that passage, the author only cites it for the purpose of pointing the distinction which he had previously made, and when he refers to the second argument of the case, he does not intend to do anything more than emphasize what he had previously pointed out as being the decision in the case. There is, no doubt, a point made against the Lord Chancellor for not having noticed at the first argument that the rent was limited by a series of equitable estates, but I do not read this part of the note as assisting the proposition contended for by the appellants, namely, that even when the device is adopted of creating a legal rentcharge always in existence, the equitable interests limited are subject to the same restrictions, having regard to feudal doctrines of law, as legal interests were.

As to subsequent text-books, it appears to me that *Chaplin* v. *Chaplin* (1) is referred to in them only in the sense that I conceive reference was made to it in the note by Butler. I accordingly come to the conclusion that that case is not an authority for the proposition contended for, and that I am at liberty to hold, as I do hold, that the device adopted in this conveyance of limiting the estate to trustees and their heirs, thereby creating a perpetual rent, enabled the draftsman effectually to deal with equitable interests dependent on it in the same way as he could have dealt with equitable interests in land itself.

Mr. Justice Wylie is bound to ascertain the value of superior interests, and to redeem them compulsorily; he was bound to ascertain the value of this rent, and to redeem it compulsorily. In such a case as this the problem of estimating whether the value of a base fee is not, as a matter of actuarial calculation, the same as that of a perpetual rent may be almost insoluble, or at least, from a common-sense point of view, extremely difficult. In point of view of value, there may be no difference between one and the

(1) 3 P. Wms. 229.

Appeal. 1914. *In re* FRANKS'S ESTATE. O'Brien L.C.

other. May not this particular form of conveyancing be regarded in the natural light of a device dealing with what is really a question of money, so as to prevent difficult, and perhaps impossible, calculations from arising? I say this, of course, not at all forgetting that the modern legislation which, under the Land Purchase Acts, enables both lands and rents to be compulsorily converted into cash, would not have been reasonably or at all in the mind of a conveyancer in 1813; but at the same time it seems to me that at all times the value of the rent depended upon the certainty of duration, and that certainty of duration, for the purpose of fixing value, is rightly ensured by a reservation in the first instance of the rent perpetual to trustees and their heirs. Why should there be a distinction between the creation of a rentcharge in trustees who are absolute strangers, and the settlement by a settlor of an annuity on a stranger who re-settles it, creating, if he thinks right, only equitable interests in the estate which was vested in him? and I think that Mr. Justice Wylie was perfectly right in holding that the creation of the perpetual annuity in the trustees places the settlement in this position, that it always existed for the purpose of supporting whatever estate was created in equity, and that it was at all times in existence to support that estate. The latter, of course, so far as the deed itself goes, was only an estate tail, but it was an estate tail capable of being operated upon by the Fines and Recoveries Act, and I accordingly think that the effect of barring the equitable estate tail in this case, was to give, as Mr. Justice Wylie has held, an absolute ownership to the tenant in tail who barred his estate.

With regard to the case of *Drew* v. *Barry* (1), which is a case binding upon us, there is no doubt there are passages in it which would, if read alone, support the contention of Mr. Oulton. In that case the Court of Appeal came to the conclusion that all that was created there was a legal rentcharge *de novo*, and, applying the strict rule of law to that, that it was in the same position as a rentcharge created *de novo* vesting by force of the Statute of Uses, and given only to a man and his heirs. It decided that clearly; it decided it on the construction of the document then before the

(1) I. R. 8 Eq. 260.

Court, and so far as that case is concerned there is an end of it; it does not help us one way or the other. There is nothing, I think, in the judgment of Lord O'Hagan which supports the contention that you are to apply that principle to a case such as the present one.

There are passages in the judgment of Christian L.J. which when read would at first sight suggest that he did have in his mind the case of an equitable estate in a rentcharge, and that he did not differentiate between that and a common-law rentcharge; but I think it is manifest that in that portion of his judgment he was not dealing at all with the *duration* of the equitable interest; he was dealing simply with the application of the doctrine of *Roddy* v. *Fitzgerald* (1), and pointing out the immateriality of whether the estate was legal or equitable. That is what he means, because later on he comes to the question of duration. Certainly, to my mind, that is not an authority on this present question. If it was, I should follow it; but I conceive it is not, and that the observations of the learned judge relied on are not binding on this Court in the present case. It would be, I conceive, an unfortunate thing if they should; it would be to create even in this twentieth century a difficulty, in the matter of estates of this character, not in accordance with our modern principles of law or with common sense.

The appeal must be dismissed with costs.

HOLMES and MORIARTY L.JJ. concurred.

Solicitors for the vendor: *Franks & Oulton.*
Solicitors for Elizabeth Mason and others: *J. C. & A. Blake.*
Solicitor for Augusta H. Burke: *John Gore.*

(1) 6 H. L. C. 828.

Barton J.
1915.
June 14, 15.
July 5.

PINKERTON *v.* PRATT AND OTHERS.

Will — Rentcharge created de novo *— Disentailing Deed — Base Fee or Perpetuity—Fines and Recoveries (Ireland) Act*, 1834 (4 *&* 5 *Wm.* 4, *c.* 92), *ss.* 1, 12, 16.

Two tenants in tail of equitable rentcharges, which had been granted to them *de novo* without remainders over, executed a disentailing deed.

Held, that the disentailing deed created merely a base fee in each rentcharge determinable on failure of the issue in tail.

Chaplin v. *Chaplin*, 3 P. Wms. 229, applied.

In re Franks's Estate, [1915] 1 I. R. 387, distinguished.

ORIGINATING SUMMONS.

Certain freeholds in the city of Belfast were, under the will of Elizabeth Pinkerton, vested in trustees in trust for her brother, William Pinkerton, for life, with remainder to any child or children for such estate and for such shares and subject to such limitations and in such manner as he should by his will appoint.

By his will, dated the 11th July, 1869, William Pinkerton provided as follows:—"I do hereby direct and appoint that the trustees or trustee thereof for the time being shall with and out of the income of the said trust estate pay the annuities following, that is to say:—To my daughter, Janet Black Pinkerton, and the heirs of her body, an annuity or clear yearly sum of £200, and to my daughter, Susan Elizabeth Pinkerton, and the heirs of her body a like annuity or clear yearly sum of £200, the said annuities respectively to be for the sole and separate use of my said daughters, respectively, free from the debts and control of their respective husbands (if any), and so that neither of my said daughters shall during coverture have power to dispose of her said annuity or any part thereof, or otherwise deprive herself of the benefit thereof by way of anticipation, the said annuities respectively to be charged upon and issuing out of the hereditaments and premises devised by the will of my said sister as aforesaid . . . and, subject and charged as aforesaid, I direct and appoint that the said trustees shall stand and be possessed of all

and singular the hereditaments and premises so devised to them by the will of my said sister as aforesaid upon trust for my son, Thomas Andrew Pinkerton, and the heirs of his body, and in default of such issue upon trust for my said daughters, Janet Black Pinkerton and Susan Elizabeth Pinkerton, and the heirs of their respective bodies in equal shares as tenants in common; and if either of them shall die without issue, then as to the entirety of the said premises upon trust for the other of them and the heirs of her body, and for default of such issue upon trust for my said son, Thomas A. Pinkerton and his heirs and assigns."

William Pinkerton died on the 30th July, 1871, and probate of his will was on the 11th October of the same year granted to Thomas A. Pinkerton, one of the executors named in his will, who was also the eldest son and heir-at-law of deceased. He being in possession as tenant in tail disentailed the property.

By disentailing assurance, dated the 12th August, 1872, Janet Black Pinkerton and Susan Elizabeth Pinkerton purported to disentail their respective rentcharges.

Thomas A. Pinkerton died on the 23rd June, 1914, intestate and unmarried. The plaintiff, Arthur Claude Pinkerton, was his eldest son and heir-at-law.

After the death of William Pinkerton, and subsequent to 12th August, 1872, his daughter Janet married a gentleman named Pratt, and his daughter Susan Elizabeth married a gentleman named Tomes. Neither Mrs. Pratt nor Mrs. Tomes had any children. These two ladies were named as defendants in the summons, which was brought for the purpose principally of deciding the question—whether the defendants, Janet Black Pratt and Susan Elizabeth Tomes, respectively, by the effect of the disentailing assurance of the 12th August, 1872, became entitled to the annuities of £200 each appointed to them respectively by the said William Pinkerton (*a*) for an estate in fee simple; or (*b*) for a base fee only.

A contract for sale of the property subject to the rentcharges had been entered into, but the purchasers refused to complete until the question as to the duration of the rentcharges of Mrs. Pratt and Mrs. Tomes had been determined. The purchasers were named as defendants in the summons.

Barton J.
1915.

PINKERTON
v.
PRATT.

M. G. Longfield for the plaintiff:—

The two rentcharges of £200 each were limited *de novo* by the testator, William Pinkerton, in exercise of his power of appointment, to his daughters for estates tail without any remainder over. Neither daughter can therefore by executing and enrolling a disentailing assurance acquire or dispose of any greater estate in her rentcharge than a base fee: *Chaplin* v. *Chaplin* (1); Butler's Co. Litt., 298a, n. 2; Preston's Conveyancing (2nd Edit.), vol. i, pp. 3, 4; Fearne on Contingent Remainders (10th Edit.), p. 528.

Sections 1, 12, and 16 of the Fines and Recoveries (Ireland) Act, 1834 (4 & 5 Wm. 4, c. 92), show that the tenant in tail can by a disentailing assurance bar the issue in tail, and also any estates to take effect after the determination or in defeasance of the estate tail.

The present case is therefore distinguishable from that of a subsisting rentcharge in fee simple, which has subsequently been settled so as to create an estate tail with remainder over, and that of a rentcharge created *de novo* in which an estate tail is limited to one donee and a remainder over to another. In either of these cases, the remainder can be defeated by the tenant in tail; but where there is no remainder in the rentcharge, as here, the only estate he can acquire or dispose of is one that will endure so long only as any of the issue in tail are living.

[He also referred to *Drew* v. *Barry* (2); *Milbank* v. *Vane* (3); and *In re Franks's Estate* (4).]

Garrett Walker K.C. for Mrs. Pratt and Mrs. Tomes and their mortgagees:—

The rule of law laid down in *Chaplin* v. *Chaplin* (1) is a rule that must give way to intention, at all events in a will. In the present case, which is that of a will, it cannot be supposed that, when the testator uses identically similar language in the limitations of the rentcharges to his daughters, and of the lands charged therewith to his son, he intended to give estates of a different character or with different legal incidents. Moreover, the present

(1) 3 P. Wms. 229.
(2) I. R. 7 Eq. 13; I. R. 8 Eq. 260.
(3) [1893] 3 Ch. 79.
(4) [1915] 1 I. R. 387, 395.

case is also distinguishable from *Chaplin* v. *Chaplin* (1), on the ground that here the estate is equitable merely.

The rentcharges are *lands* within the meaning of sect. 12 of the Fines and Recoveries (Ireland) Act, 1834, and the disentailing deed was under that section effective to bar the entail, and to create a fee simple and not merely a base fee. *Chaplin* v. *Chaplin* (1) was not a decision on this section, and cannot override the plain enacting words of the statute.

[He also relied upon *In re Franks's Estate* (2).]

Megaw, for the intending purchasers:—

The question concerns the purchasers as to whether there is a good title shown to these freehold lands in the city of Belfast, and that depends on the determination of the question, whether the effect of the disentailing deed was to create a fee simple or a base fee only in the annuities of £200 created *de novo* by the will of William Pinkerton in favour of his two daughters. There has been no exposition of the law relating to the subject since 1834, when the Fines and Recoveries (Ireland) Act, 1834, was passed. That Act put *rent* in the same position as *land*. Clearly a fee simple would be created in lands by the words occurring in the will, and it is almost impossible to appreciate the distinction sought to be drawn between *rent* and *land*. See Butler's Co. Litt., 298a. If sect. 16 is to be construed according to its plain meaning, an estate in fee simple would be given.

The purchasers are willing purchasers, and support the contention of the other defendants.

[Counsel also referred to Lord Halsbury's "Laws of England," vol. xxiv, p. 190 (note v); Challis on Real Property, p. 346.]

BARTON J.:— July 5.

Janet Black Pratt and Susan Elizabeth Tomes, being entitled respectively, as tenants in tail, to two annuities of £200, which had been appointed by the will of William Pinkerton, executed a disentailing deed dated the 12th August, 1882. Under William Pinkerton's will these annuities were limited in tail *de novo* without remainders over. The question for decision is

(1) 3 P. Wms. 229. (2) [1915] 1 I. R. 387, 395.

Barton J. 1915. PINKERTON v. PRATT.

whether they (the donees) became entitled to an estate in fee simple, or to a base fee only.

In my opinion, the case is covered by the passage which has been quoted from *Chaplin* v. *Chaplin* (1): "Moreover, the Court conceived that if such a rent *de novo* be granted in tail without any remainder over, and the tenant in tail suffers a recovery thereof, this recovery, though it will turn the estate tail into a fee, yet the same will pass but a determinable fee, which must end on the death of the tenant in tail without issue, for the grantor never agreed to charge the land any further with the rent; and it would be a wrong to the terre-tenant to burthen his estate with the rent for any longer time."

That passage was recognized in Butler's note to Co. Litt. 298a, and in Preston's Conveyancing, vol. i, p. 3, and may be said to have passed into our law.

At the conclusion of the arguments I felt no difficulty, and only reserved judgment in order to have an opportunity of considering *In re Franks's Estate* (2), which was relied upon by Mr. Garrett Walker. That was a different case, in which the Court considered that a perpetual rentcharge had been created and had been vested in a trustee in fee, so that, after the equitable estate tail, there remained an equitable remainder or reversion, which was capable of being barred by a disentailing deed, so as to turn the estate tail into an estate in fee simple. That case is, in my opinion, distinguishable from the present one.

I cannot agree with Mr. Garrett Walker that the passage in *Chaplin* v. *Chaplin* (1) which we are discussing does not apply to equitable estates tail. Equitable estates, as a general rule, follow the analogy of legal estates. There are exceptions to that general rule, but this is not one of them.

Mr. Garrett Walker urged very strongly that sect. 16 of the Fines and Recoveries (Ireland) Act, 1834 (which corresponds with section 15 of the English Act of 1833), changed the law in this respect. I cannot agree with that contention. Except as regards the Crown, that section made little, if any, difference in the law. Lindley L.J. (dealing with section 15 of the English Act, which

(1) 3 P. Wms. 229, at p. 230. (2) [1915] 1 I. R. 387, 395.

corresponds with section 16 of our own Act) in *Milbank* v. *Vane* (1) said at page 88: "I do not think that sect. 15 has in any way altered the law as it stood before. I do not think there is any difference between the operation of that section and the operation of fines and recoveries as they were well known, and as they were worked out in the case of *Doe* v. *Earl of Scarborough*" (2). In support of Lindley L.J.'s view, let us compare the words of the section with Tindal C.J.'s description, in the *Earl of Scarborough's Case* (2), of the effect of a common recovery as having "its ordinary effect in barring and extinguishing all remainders and other interests of every nature subsequent to such estate tail." Reference may also be made for the same purpose to Preston's Conveyancing, p. 2. The rule that the disentail of a rentcharge which was limited *de novo* without remainders over, creates only a base fee, is still preserved in modern text-books (e.g. Challis, Jarman, and Lord Halsbury). In *Drew* v. *Barry* (3), forty years after the passing of the Fines and Recoveries Act, it was recognized and adopted by Lord O'Hagan at pp. 269 and 274, and by Christian L.J. at p. 289. "Lands" in section 16 of the Act includes "rents," but the language of the section does not embrace rents granted *de novo* without remainders over.

A glance at the origin and reason of this old rule will not be out of place. It has been attributed to an old-time objection to throwing an unjust burden on the terre-tenant, who was preferred to the rentchargeant by the feudal law, because the rentchargeant was subject to none of the feudal services which the terre-tenant had to perform. But there were also two legal principles bearing upon the question, which were quite irrespective of this feudal preference. There was the principle that a recovery could not acquire for a tenant in tail a larger estate than the donor of the estate tail had. There was also the principle that, while a corporeal hereditament, being a permanent physical object, cannot be created *de novo* by a donor, a rentcharge can be carved out of a corporeal hereditament, and can be created *de novo* by its donor. It follows from these two propositions that, where

(1) [1893] 3 Ch. 79. (2) 3 A. & E. 2, 897, 973.
(3) I. R. 7 Eq. 13; I. R. 8 Eq. 260.

Barton J.
1915.

PINKERTON
v.
PRATT.

the donor of an estate tail in a rentcharge had no previous estate in the rentcharge, and it had no existence until he created it for an estate tail only, the recovery could not enlarge it beyond the limits of its original existence. If, however, the donor of an estate tail of such a rentcharge goes on to limit it by way of remainder in fee, then he substantially creates a rentcharge in fee, which could have been barred by a common recovery, and can now be barred by a disentailing deed, so as to acquire an estate in fee for the tenant in tail. In the case of a rentcharge created *de novo* without remainders over, there is no remainder or reversion capable of being barred. There is no reversion in the donor, as there would be in the case of a fee simple rentcharge *in esse*, nor is there any remainder, or any other limitation which, according to the language of section 12 of the Irish Fines and Recoveries Act, could "take effect after the determination or in defeasance of any such estate tail." The rule, however archaic and artificial it may be, has, in my opinion, survived the Fines and Recoveries Act, with the result that the effect of this disentailing deed was to convert the estates tail in these rentcharges into base fees.

Solicitors for plaintiff: *L'Estrange & Brett.*

Solicitors for the rentchargeants and their mortgagees: *Whitney & Moore.*

Solicitor for the intending purchasers: *Geo. Allen.*

R. W. L.

THE BIRR (No. 1) RURAL DISTRICT COUNCIL *v.* THE BIRR URBAN DISTRICT COUNCIL.

M. R.
1915.

June 17, 18.
July 21.

Local Government—District Council—Sanitary Authority—Water Supply—Supply and Sale of Water to Persons in Adjoining District—Injunction—Consent—Acquiescence—Infringement of Statutory Right—No Special Damage—Right of Action of Party aggrieved—Injunction which would prevent Supply of Water to Troops—Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 52), *ss.* 61, 71—*Public Health (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 54), *s.* 2.

By sect. 61 of the Public Health (Ireland) Act, 1878, an urban or rural sanitary authority may provide its district with a supply of water for public purposes, and for such purposes may construct and maintain waterworks, and may contract with any person for a supply of water. By sect. 2 of the Public Health (Ireland) Act, 1896, any sanitary authority may, with the consent of the sanitary authority of any adjoining district, supply and sell water to any person in an adjoining district.

The defendants, an urban sanitary authority, had constructed waterworks for the supply of their district, and in the year 1907 they entered into a contract with the Secretary for War for the supply of water to military barracks in an adjoining district of which the plaintiffs were the rural sanitary authority. No formal consent, under seal, to this had been given by the plaintiffs, but they had full notice of the defendants' intention to supply the water to the barracks, and acquiesced in its being supplied, on the faith of which acquiescence the defendants incurred expenditure. The plaintiffs now brought an action claiming an injunction to restrain the defendants from supplying water to persons within the plaintiffs' district without the consent of the plaintiffs.

Held, that the effect of the Public Health (Ireland) Acts, 1878 and 1896, is to give to each sanitary authority a monopoly in the supply of water to its own district, and that the violation of this monopoly by another sanitary authority is actionable without proof of special damage.

But *held*, that in the present case there was acquiescence by the plaintiffs amounting to consent, and that, therefore, the action was not sustainable.

Held, also, that even if the action had not been unsustainable on this ground, the Court would not, under present circumstances, grant an injunction which would have the effect of depriving His Majesty's troops of a good and wholesome supply of water.

M. R.
1915.

BIRR (No. 1) RURAL DISTRICT COUNCIL *v.* BIRR URBAN COUNCIL.

TRIAL OF ACTION.

The following statement of facts is taken from the judgment of the Master of the Rolls:—

"The plaintiffs in this action are the Birr (No. 1) Rural District Council, and they claim an injunction against the defendants, who are the Birr Urban District Council, restraining them from supplying water to any person or persons within the district of the plaintiffs without their consent.

"Both parties are the respective sanitary authorities of their respective districts, which are adjoining.

"In the year 1906, the defendants, for the purpose of supplying their district with water, obtained a Provisional Order enabling them to put in force the powers of the Lands Clauses Acts, as amended by sect. 8 of the Public Health (Ireland) Act, 1896, with reference to the purchase and taking of lands otherwise than by agreement, and this Provisional Order was confirmed by Act of Parliament.

"Under this Act the defendants, as they were entitled to do, acquired some land at a place called Ballyshane, within the plaintiffs' district, where they constructed works in connexion with the source of supply, and laid therefrom water-mains through the plaintiffs' district to a reservoir within the defendants' district, from which water is distributed. This was done in accordance with the statutory powers vested in the defendants, and it is not contended that they so far acted illegally.

"The plaintiffs have not constructed any waterworks for their district.

"There are military barracks situate at some distance outside the boundary of the urban district, and within the plaintiffs' district, and there being great need of water for the troops quartered there, the Secretary of State for War entered into an agreement, dated the 30th November, 1907, for the supply of water to the barracks in consideration of certain payments. The term for which this agreement was to run was fifteen years. In order to give the supply to the military barracks, the defendants constructed a special main from their reservoir within their district to the barracks. This main runs partly through the defendants' district and partly through the plaintiffs' district.

"The evidence proved conclusively that the plaintiffs had full notice of the intention of the defendants to supply water to the barracks, and acquiesced in it. In the first place, the deposited plans showed the line of the main to the barracks from the reservoir, and the statutory notices were advertised and served on the plaintiffs' clerk. Apart from this, the plaintiffs must have been fully aware of the defendants' intentions. Water-mains cannot be laid along a public road secretly. There is, in addition, affirmative evidence coming from the plaintiffs' own records not only that they were aware of the intention to supply the barracks, but that they sought to take advantage of the supply for their own purposes.

"The barracks are situate alongside the village of Crinkle in the plaintiffs' district. The supply of water to that village was very defective, and in the month of November, 1906, it was resolved by the plaintiffs to sink a pump well there. This is shown by the plaintiffs' minutes of the 1st November, 1906.

"On the 2nd February, 1907, the plaintiffs adopted the following resolution:—'In view of the probability, in the near future, of a water scheme being adopted by the Birr Urban Council, providing for the extension to the military barracks at Crinkle of an excellent supply of water, it was ordered, That our clerk of works be instructed not to proceed at present with the sinking of the proposed well at Grove Street, in the village of Crinkle.'

"After passing this resolution the plaintiffs waited until the main was laid to the barracks, and they then addressed this letter to the defendants—

"BIRR (No. 1) RURAL DISTRICT,
"Clerk's Offices, Workhouse,
"BIRR, 23*rd June*, 1909.

"DEAR SIR,

"The question of providing a water-supply, by way of a pump-well, for the residents of Grove Street, Crinkle, having come before the District Council at their last meeting, I am directed to inquire whether the Birr Urban Council could see their way to provide the residents in question with a supply from the urban water-main, and, if so, the probable cost of same.

"I am, dear sir,
"Yours faithfully,
"WILLIAM LOWRY.

"H. Barlow, Esq.,
"Clerk of the Birr Urban Council,
"Town Hall, Birr.

M. R.
1915.

BIRR (No. 1) RURAL DISTRICT COUNCIL
v.
BIRR URBAN COUNCIL.

"This was replied to by letter dated the 15th July, 1909.

"TOWN HALL, BIRR,
"*15th July*, 1909.

"*Water Supply for Crinkle.*

"DEAR SIR,

"I am directed by the Birr Urban Council to say in reply to your letter of inquiry that they would be prepared to supply the inhabitants of Crinkle with a water-supply from their main on such terms as may be agreed upon. In reference to the terms I am directed to suggest that they could easily be arranged if your Council appointed a small committee with their engineer, to meet a like committee from the Urban Council and the Town Surveyor, and determine, on the spot, the position, &c., of such fountains as may be desired. I shall be glad to hear from you regarding this suggestion.

"I am, dear sir,
"Your obedient servant,
"HENRY BARLOW, Clerk.

"To W. Lowry, Esq.,
"Clerk R. D. Council, Birr.

"The parties could not come to terms, and the plaintiffs proceeded to sink artesian wells at Crinkle; and having spent much money and time on the work, found that the plan was a failure. They again approached the defendants with a view of getting a supply of water from them. Again there was a failure to come to terms, and it was from this failure that the action sprung.

"It is not for this Court to determine whether the defendants required too big a price for the water required for the village of Crinkle, or whether they could reasonably have afforded the supply. The question at issue is whether the plaintiffs are entitled to restrain a supply to the barracks.

"In addition to the complaint about the supply to the barracks, the plaintiffs (but only incidentally) complain of a supply to Hillbrook House and a laundry; but as the revenues derived from these two places are only on the average £3 and £4 each per annum, it may be said that these cases were only dragged in to show that the barracks was not the only place supplied. The main complaint is about the barracks."

At a meeting of the plaintiff council, held on the 3rd September, 1914, the following resolution had been passed:— "Resolved, that our solicitor, Mr. O'Meara, be instructed to apply for an injunction restraining the Birr Urban Council from supplying water illegally to the military barracks situate at Crinkle, within the Birr (No. 1) Rural District, and that we claim £100 damages."

Serjeant Sullivan K.C. and *Clancy K.C.* (with them *W. G. Shannon*), for the plaintiffs:—

The effect of s. 71 of the Public Health (Ireland) Act, 1878, and s. 2 of the Public Health (Ireland) Act, 1896, is to give the plaintiffs, as the rural sanitary authority, a monopoly in the supply of water in their district, unless they consent to its supply by the sanitary authority of the adjoining district. The plaintiffs might be compelled to provide their district with a supply of water: Public Health (Ireland) Act, 1896, s. 15. They are the proper body to strike and collect the water-rate: Public Health (Ireland) Act, 1878, s. 66; *Rathdrum Rural District Council* v. *Saul* (1). It will be said that the plaintiffs are precluded from bringing this action by their acquiescence, but this is not so: *Islington Vestry* v. *Hornsey Urban Council* (2). Mere failure to institute legal proceedings does not amount to consent: *Rochdale Canal Co.* v. *King* (3); *In re Maddever, Three Towns Banking Co.* v. *Maddever* (4). Consent on the part of a public body must be a corporate act. [They also referred to *Willmott* v. *Barber* (5); *Civil Service Musical Instrument Ass., Lim.*, v. *Whiteman* (6); *Chamberlaine* v. *Chester and Birkenhead Railway Co.* (7).]

Serjeant Matheson K.C., and *Denning K.C.* (with them *Price*), for the defendants:—

The action is unmaintainable, because the plaintiffs stood by and consented to the work, and even asked to be allowed to participate in the benefit of it (see letters of the 23rd June, 1909, and

(1) 39 I. L. T. R. 270.
(2) [1900] 1 Ch. 695.
(3) 2 Sim. (N. S.) 78.
(4) 27 Ch. D. 523.
(5) 15 Ch. D. 96.
(6) 68 L. J. Ch. 484.
(7) 1 Exch. 870.

M. R. 1915.

BIRR (No. 1) RURAL DISTRICT COUNCIL *v.* BIRR URBAN COUNCIL.

the 15th July, 1909). The Public Health (Ireland) Act, 1896, does not require the consent of a sanitary authority to be given in any particular form; a seal is only required for contracts for *goods* to the value of over £50. So, even if the work was unlawful, the plaintiffs are disentitled to ask for an injunction; when it was projected they could have served a notice under sect. 36 of the Public Health (Ireland) Act, 1878.

Further, the plaintiffs have no such interest as entitles them to seek relief: *Pudsey Coal Gas Co.* v. *Corporation of Bradford* (1). This is only a technical invasion of a right of jurisdiction, not of a right of property. Section 2 of the Public Health (Ireland) Act, 1896, is enabling, not restrictive, and gives the plaintiffs no higher right of action than they had before. A sanitary authority has no exclusive right of supplying water within its district, and therefore suffers no damage by another person supplying it, even if that person acts unlawfully in so doing. [They referred to *The Stockport District Waterworks Co.* v. *Mayor, &c., of Manchester* (2); *The Mayor, &c., of Liverpool* v. *Chorley Waterworks Co.* (3); *The Mayor, &c., of Cardiff* v. *Cardiff Waterworks Co.* (4).]

Clancy K.C. in reply.

Cur. adv. vult.

July 21.

O'CONNOR M.R., after stating the facts as above, continued:—

The plaintiffs' case is that they are deprived of the opportunity of supplying water to the barracks and to private consumers within their district, and are deprived of large water rates, and have suffered loss and damages thereby. This is a somewhat strange averment by a sanitary authority which has no water-supply. It is difficult to see how the plaintiffs could have suffered damage under the circumstances. If they had a water-supply, they might suffer damage by a supply from another body, because they might lose a revenue derivable from the supply of water by contract to persons within their district. But as matters stand they lose nothing. Damage suffered by the plaintiffs is therefore out of the question.

(1) L. R. 15 Eq. 167.
(2) 9 Jur. (N. S.) 266.
(3) 2 D. M. & G. 852.
(4) 5 Jur. (N. S.) 953.

It remains, however, to be considered whether there has been any invasion by the defendants of the plaintiffs' rights.

Now, in order to narrow down the issue, and to free the case from any erroneous conceptions, it must be borne in mind that the plaintiffs cannot rely upon any trespass to lands, for the simple reason that they have no property in the lands on which the waterworks were constructed or the mains laid. I think it right to emphasize this, because the claim for a mandatory injunction to compel the defendants to remove all reservoirs, water-mains, and pipes erected or laid by them within the plaintiffs' district, suggests a claim of property in the district, for which there is no foundation.

If the plaintiffs' rights have been invaded, they must be purely statutable rights. Let me see now what these are.

Sanitary authorities, both urban and rural, have power to supply their respective districts with water: Public Health (Ireland) Act, 1878, sect. 61. They also have power, with the sanction of the Local Government Board, to supply water to the sanitary authorities of adjoining districts: sect. 71. A sanitary authority may also, with the consent of the sanitary authority of an adjoining district, supply and sell water to any person in such adjoining district: Public Health (Ireland) Act, 1896, sect. 2. I interpret these sections as enacting that, while sanitary authorities may provide water for their own districts, they shall not supply water to any person in another district without the consent of the sanitary authority of that district. This gives a right of veto to the latter, and its violation must be an actionable wrong. Some authorities were cited by defendants' counsel for the proposition that, although the defendants may have exceeded their statutable powers in supplying water outside their district, that gave the plaintiffs no right of action, as they had no interest in the affairs of the urban district council, and suffered no special damage. It was contended that the action to be maintainable at all should have been taken by the Attorney-General. *Pudsey Coal Gas Co.* v. *Corporation of Bradford* (1), *Stockport District Waterworks Co.* v. *The Mayor of Manchester* (2), and *The Mayor of Liverpool* v. *Chorley* (3), were relied upon; but, as I understand all these cases,

(1) L. R. 15 Eq. 167. (2) 9 Jur. (N. S.) 266. (3) 2 D. M. & G. 852.

M. R. 1915.

BIRR (No. 1) RURAL DISTRICT COUNCIL v. BIRR URBAN COUNCIL.

the judgments proceeded upon the ground that, while the defendants may have acted ultra vires, there was no right of the plaintiffs invaded. For instance, a waterworks company, authorized to supply water to a district, but having no monopoly, suffers no legal wrong if an unauthorized company supplies water to the same district. But the present case is to my mind wholly unlike these cases, because it appears to me that the Public Health Acts have given to each sanitary authority a monopoly in the supply of water to its own district as in other matters. Every sanitary authority is specially protected by the Acts from interference in the affairs of its district by a neighbouring sanitary authority, and any violation of the provisions affording such protection gives a right of action to the authority concerned. In *Chamberlaine* v. *The Chester & Birkenhead Railway Co.* (1), Pollock C.B. says, at p. 876:—"Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage—some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, there it is not necessary to allege special damage." Now I find in the provision for obtaining the consent of the sanitary authority to whom the supply is given by another sanitary authority, a special protection for the former given by the Acts, and therefore I think that the violation of the condition gives a right of action, although no special damage is suffered.

This brings me to the question, Has there been any violation of the plaintiffs' right? Did the plaintiffs give their consent to the supply of water to persons within their district? No doubt there is no formal consent in writing under seal to be found, but, as I have pointed out, the evidence is overwhelming that the plaintiffs in fact consented to the supply of water to the barracks, and that on the faith of that consent considerable expenditure

(1) 1 Exch. 870.

was incurred and obligations undertaken. There was acquiescence of the most indubitable character, and acquiescence involves consent. *Islington Vestry* v. *Hornsey Urban Council* (1) was cited to show that a body like the plaintiffs cannot be bound by acquiescence, but the case is not in point. The action was brought to restrain the defendants from sending their sewage into the plaintiffs' sewers. The defence set up was that the plaintiffs had agreed to allow the defendants to do so, but it was held that the plaintiffs had no power to enter into any such agreement, and that, at most, they only gave a revocable licence. But in the present case the plaintiffs had full power to consent to a supply of water by the defendants, and it cannot be said that the consent is revocable at any time, because that might mean a large and useless expenditure. The inducement to the urban council to incur the expense of laying a main from their reservoir to the barracks was a contract by the Secretary of State to take water for a term of fifteen years.

I hold that the plaintiffs did give their consent to the supply of water to the barracks under the contract.

This really disposes of the entire cause of action. No doubt the defendants supply water at two other places, but these were only dealt with incidentally, and the cases were not differentiated from the case of the barracks. The latter was regarded and treated as *the* cause of action, and that is shown by the plaintiffs' minute of the 3rd September, 1914.

The judgment will be that the action be dismissed with costs.

I wish to say further that even if I were not satisfied that the action is unsustainable on the grounds I have mentioned, I certainly would not under present circumstances give an injunction which (if valid) would have the effect of depriving His Majesty's troops of a good and wholesome supply of water.

Solicitor for the plaintiffs: *P. V. Loughrey.*

Solicitors for the defendants: *R. F. Barry & Son.*

A. H. W.

(1) [1900] 1 Ch. 695.

In the MATTER of the ESTATE of the MARQUIS OF CLANRICARDE.

Wylie J.
1915.

June 14, 15, 16, 18, 22, 23, 25, 30. July 29.

Land Purchase Acts—Compulsory Purchase—Application by Owner to fix Price—Value of Money—Date as of which taken—Irish Land Act, 1909 (9 *Edw.* 7, *c.* 42), *s.* 63 (2).

On an application, by way of objection, to the Judicial Commissioner to fix the price to be paid for an estate or untenanted land acquired under the compulsory provisions (Part IV) of the Irish Land Act, 1909, the price will be fixed having regard to the value of money as of the date of the hearing of such application.

Question arising on the hearing of applications by the Marquis of Clanricarde, by way of objection, to the Judicial Commissioner to fix the price to be paid for his estate which was being acquired by the Congested Districts Board under the compulsory provisions (Part IV) of the Irish Land Act, 1909. The estate, which was situated in County Galway, consisted of over 50,000 acres, and comprised nearly 1,200 holdings, of which about two-thirds were judicial, and one-third non-judicial, and some untenanted lands. It had, for the purpose of purchase, been divided by the Congested Districts Board into seven different sections, viz., the Galway section, the Craughwell section, the Loughrea section, the Derrybrien section, the Woodford section, the Portumna section, and the Eyrecourt section. The facts, so far as material for the purpose of the present report, were as follows:—On the 12th December, 1911, a proposal to purchase in respect of each section of the estate was made to the owner by the Congested Districts Board, the aggregate sum offered for the seven sections being £269,115 Guaranteed 3 per cent. Stock. This was refused. On the 29th January, 1912, the Board made a final offer to the owner in respect of each section of the estate, the aggregate sum offered for the seven sections being £228,075, at the following sums: the Galway section £16,031, the Craughwell section £7,053, the Loughrea section £77,250, the Derrybrien section £2,129, the Woodford section £23,790, the Portumna section £68,325, and the Eyrecourt section £33,497, which was the

cash value at the price of the day of the previous aggregate offer in stock. On the 19th February, 1912, the owner issued out of the Chancery Division seven writs of summons claiming an injunction to restrain the Board from sending to the Estates Commissioners a requisition to take the necessary steps to acquire the estate compulsorily. Notwithstanding these writs, on the 19th March, 1912, the Estates Commissioners published in the *Dublin Gazette* notices containing particulars of the final offers of the Board, pursuant to the provisions of s. 61, sub-s. 1, of the Act of 1909; and, on the 16th April, 1912, the plaintiff in the Chancery actions obtained an order to amend the writs by making the Estates Commissioners also defendants, and claiming to restrain them from taking steps to acquire the estate. On the 19th April, 1912, notice was served on behalf of the owner, in respect of each final offer, of an application to the Judicial Commissioner for an order to restrain the Estates Commissioners from acquiring the estate or untenanted land therein comprised, pursuant to the provisions of s. 62, sub-s. 1, of the Act of 1909; and on the same date notice was served on behalf of the owner, in respect of each final offer, of an application, by way of objection, to the Judicial Commissioner to fix the price to be paid for the estate and untenanted land therein comprised, pursuant to the provisions of s. 63, sub-s. 1, of the Act of 1909. These notices were served without prejudice to the seven actions, and, on the application of the owner, were adjourned pending the result of the Chancery proceedings. The seven actions were consolidated, and, on the 5th June, 1913, the Master of the Rolls made an order granting an injunction. This order was reversed on appeal, and, on the 12th December, 1914, the order of the Court of Appeal was affirmed by the House of Lords. On the 19th December, 1914, the notices served by the owner of applications pursuant to the provisions of s. 62, sub-s. 1, of the Act of 1909, were withdrawn, and at the request of the owner the applications to the Judicial Commissioner to fix the price were further adjourned in order to enable his evidence on the question of value to be completed. These applications now came on for hearing. The owner had been in receipt of the rents and profits of the estate up to the present time.

Wylie J.
1915.

In re CLANRICARDE'S ESTATE.

S. L. Brown K.C. (with him *W. M. Jellett K.C.*, and *J. F. Walsh*) for the owner:—

Having regard to the marked change in the value of money since these compulsory proceedings were commenced, the date as of which the fair value of the estate to the owner is to be assessed, and the various elements which must be taken into account, including the value of money, ascertained, becomes of considerable importance. In proceedings under the Lands Clauses Acts the interest in respect of which compensation is being assessed must be valued as matters stood at the moment when the notice to treat was given: *Penny* v. *Penny* (1); *In re Athlone Rifle Range* (2). The owner of land which is being taken cannot deal with the land, after receipt of the notice to treat, so as to increase the burdens of the promoters as regards compensation to be made: *Mercer* v. *Liverpool Railway Company* (3). It follows that all the elements which must be taken into account in assessing the compensation must be ascertained as they existed immediately before the notice to treat. In proceedings under the compulsory provisions of the Irish Land Act of 1909, the stage analogous to the notice to treat is the publication of particulars of the final offer in the *Dublin Gazette*. See *R.* (*Hinds*) v. *The Estates Commissioners* (4), which was a decision under the Evicted Tenants Act, 1907, incorporating the final offer procedure. At that stage the compulsory proceedings become irrevocable, subject of course to any application under s. 62 or s. 63. Under the latter section, on an application to fix the price, all the Judicial Commissioner has jurisdiction to do is to insert in the final offer the price which should have been there. This involves that the price must be assessed, and all the necessary elements for that purpose ascertained, as of the date on which the final offer irrevocably became the basis of compulsion by being published in the *Gazette*, i.e., in the present case, as of the 19th March, 1912.

Denis Henry K.C. (with him *John Muldoon K.C.*), for the Congested Districts Board:—

With regard to proceedings under the Lands Clauses Acts, in

(1) L. R. 5 Eq. 227.
(2) [1902] 1 I. R. 433.
(3) [1904] A. C. 461.
(4) [1909] 2 I. R. 258.

Cripps' Law of Compensation (Ed. 1905), at p. 77, it is stated:— "In practice it is generally agreed that the amount of compensation shall be assessed as from the date of the inquiry, or from the date when the promoters would take, or had taken, possession of the lands in question for the purpose of their undertaking; but if the claimant can prove that he has suffered loss between the time of his receiving notice to treat, and his dispossession by the promoters, he is entitled to claim for it: *Cramwell* v. *The Mayor of London* (1)." As regards the present proceedings, under s. 63, sub-s. 1, of the Act of 1909, the application to fix the price can only be adjudicated upon "subject to any application to the Judicial Commissioner under the last preceding section, and to the final determination of all questions arising thereon." The notices of application under s. 62 to restrain the Estates Commissioners from acquiring the estate at all were not withdrawn until the 19th December, 1914. So long as they were pending there was no power to adjudicate on the present applications under s. 63. It was as a result of the action of the owner that the price was not fixed in 1912. He has been in receipt of the rents and profits of the estate up to the present time. The price must be ascertained as of to-day, and, as regards the question of the value of money, the Court is now in a position to know what it would have been entitled to speculate about in 1912.

Cur. adv. vult.

July 29.

WYLIE J.:—

This is an application to fix the price to be paid by the Congested Districts Board for the Clanricarde estate. It is brought by way of objection to the price named in the final offer of the Board made on the 29th January, 1912, and afterwards gazetted on the 19th March, 1912. It presents to me for solution the biggest and most difficult problem I have ever had to solve, and the problem has been rendered more difficult by the character of the evidence that has been given and the absence of material evidence withheld.

The estate is a large one, consisting of over 50,000 acres, and comprising nearly 1,200 holdings. It has, for the purpose of

(1) L. R. 5 Ex. 284.

Wylie J. 1915. *In re* CLANRICARDE'S ESTATE.

purchase, been divided by the Board into seven different sections, in accordance with its geographical divisions. They are called the Galway section, the Craughwell section, the Loughrea section, the Derrybrien section, the Woodford section, the Portumna section, and the Eyrecourt section. A separate and distinct final offer was made for each section.

In order to understand fully the proceedings and evidence it is necessary to refer shortly to some of the statutory provisions regulating compulsory purchase. When the Congested Districts Board propose to purchase any lands, in order to ascertain the boundaries, extent, and character of the land, and to estimate the price to be offered for the same, they are empowered by section 59 of the Act of 1909 to send inspectors and surveyors upon the land after notice to the owner. And, as by section 60 it is only after negotiations have been entered into or proposals made for the purchase, and no agreement has been arrived at, that the Board can make a final offer as the first step towards compulsion, it is obvious that the Board must make some kind of an offer prior to the "final offer." This prior offer must be in land stock, because under the Act of 1909, if it were accepted, it could only be paid or advanced in stock. Accordingly, in order to be in a position to make this prior offer, it was necessary for the Board, as they were refused all information from the estate office, to send valuers and surveyors upon the land to ascertain the boundary of each holding, its rent, and value, because for the purpose of bonus a price must be fixed on each holding. They had, therefore, not only to survey the estate as a whole, but to construct maps, showing each holding separately, and a rental of the estate, from information derived from the tenants and their rent receipts. The immense difficulty of this task will be seen by a glance at the maps and the reference schedules, showing that a very large proportion of the holdings are made up of many plots so intermixed and scattered that only by a practised eye and with great difficulty can they be discovered on the map.

In this condition of things the Board's valuers, in order to estimate the value of each holding, took the only course that was practically open to them, they valued every holding by marking on the map their acreable valuation for each plot; and their gross

fair rent for each holding was afterwards worked out by the surveyors in the usual way and furnished to the valuers, who then fixed their estimated fair rent and the price to be offered for each holding. The untenanted land intended to be purchased was also valued in the same way, and the price fixed. In this manner the estimated price in stock to be offered for each of the seven sections of the estate was made out, and a proposal to purchase at that price was made by the Board. This being refused, the Board on the 29th January, 1912, made their final offer. As the statute requires this offer to be in cash, it was simply the cash value at the price of the day of the previous offer in stock. Having received this offer on the 29th January, 1912, Lord Clanricarde, on the 19th February, 1912, issued out of the Chancery Division seven writs of summons claiming an injunction to restrain the Board from sending to the Estates Commissioners a requisition to take the necessary steps to acquire the estate compulsorily. Notwithstanding these writs, the Estates Commissioners gazetted the lands for compulsory purchase on the 19th March, and on the 16th April the plaintiff in the Chancery actions obtained an order to amend these writs by making the Estates Commissioners also defendants, and claiming to restrain them from taking steps to acquire the estate. On the 18th April the present application to fix the price was served, without prejudice to the seven actions, and, on the application of the owner, was adjourned pending the result of the Chancery proceedings. These having been finally disposed of in the House of Lords, the present application was further adjourned on the request of the owner in order to give his valuers time to value the estate. When this adjournment was obtained, it occurred to me that a field-to-field valuation by the owner's valuers would not be of much assistance to me in solving the only question I had to decide, viz., the fair value of this estate to the owner; and I then intimated to the parties that I would expect evidence to be given of the net income in cash actually received by the owner out of this estate each year for the past ten or fifteen years, or longer if they thought fit. I regret to say that the evidence on this point has been most unsatisfactory, though having arrived at a decision, after a full and careful consideration of all the evidence before me, I find it impossible to

Wylie J. 1915.

In re CLANRICARDE'S ESTATE.

say which side may have suffered from the want of more definite evidence on this point.

Before dealing in detail with the evidence given by the Board and the owner, I may as well dispose of the only legal question raised in the case. The owner contends that I am to fix the same price now in moneys numbered as I would have fixed if I had been hearing the case in January or March, 1912. In other words, if I would have fixed the price in 1912 at, say £200,000, I must still fix it at the same sum, though that £200,000 is now only value for, say £180,000, so that I would be giving him for his estate, that had remained the same, £20,000 more than it was value for in 1912. What would have happened if he had been paid £200,000 in 1912? Why, he would have invested it in Government and other securities at the price of the day, which he would now hold as representing the value of his estate, and which have depreciated so much that they can now be obtained for £180,000. Surely, therefore, by giving him £180,000 now, I would be putting him in the same position as if he had got £200,000 in 1912, and giving him the same value for his land. The owner's contention was based on an alleged analogy between a purchase like this and a purchase under the Lands Clauses Acts, where compensation is to be fixed according to the value of the interest taken as of the date immediately before the service of the notice to treat. I was referred to a number of well-known cases which clearly establish this principle. But I was referred to no case in which the question of a change in the value of money was involved. There is nothing in any of the Acts or cases with reference to any number of years' purchase. What has to be given is money *value*. Again, it seems to me there is no analogy in this respect between a notice to treat and a final offer, whether gazetted or not. If not gazetted, it is not, like a notice to treat, binding unless accepted. I express no opinion as to its binding effect after gazetting. But the legal principle upon which the rule as to the time at which compensation is to be assessed in cases under the Lands Clauses Acts is based, is that, upon the service of a notice to treat, the equitable interest in the land passes to the purchaser, while it is clear, I think, that under the Land Purchase Acts no interest in the land is transferred to

the Congested Districts Board either by the service or gazetting of a final offer. Under section 43, an interest only passes, when the offer is accepted, as from the date upon which the Estates Commissioners certify that they are satisfied with the owner's right to sell; under section 64, only when the proceedings to fix the price are completed and the money is paid into bank. Besides, how can the owner put forward this contention when he has been exercising in the most forcible manner all the rights of ownership over the estate up to the present time, and, except in the Derrybrien and Woodford sections, has never had a better rent collection than during the last three years? Therefore, if I were to treat the Congested Districts Board as owners since the service or gazetting of the final offer, they would be entitled to claim all the rents collected since that date, allowing of course, as against them, interest on the purchase-money.

For all these reasons I think that I must fix the price as of to-day, having regard to the value of the land to the owner at the present time, or what, in this case, amounts to the same thing, as of 1912, having regard to the then value of the land to the owner, but, in either case, according to the present value of money.

Now, let me refer shortly to the great mass of evidence which I have had to deal with. [His Lordship proceeded to deal with the evidence submitted by the Board and by the owner, and continued:]

Now it is obviously a most difficult matter, having regard to the glaring differences in the valuations put by the different valuers, even when on the same side, upon the vast numbers of holdings comprised in this estate, for anyone to arrive at a very satisfactory conclusion as to the fair value of this estate to the owner; hence my desire and special request to be furnished with clear evidence, extending over a considerable number of years, of the net cash received each year by the owner out of this estate. It is inconceivable that on an estate like this there would not exist in the office the clear evidence for which I have asked. Such evidence, however, has not been given, and I have therefore been obliged, from such material as has been supplied, to form my own judgment, as best I can, of the net cash income which the owner might in future reasonably expect to receive out of this estate if it

Wylie J. 1915.

In re CLANRICARDE'S ESTATE.

had not been sold, and to estimate the capital sums that would now represent its value, having regard to the nature of the security for its payment. I do not enter into details. It is impossible to set out all the matters that affect one's mind when forming a judgment in a case like this. But having given the entire case the fullest and best consideration of which I am capable, and striving, without the slightest leaning one way or other, to act justly between the parties, I have fixed the price as follows:—

Galway Section—Tenanted, £15,714; untenanted, £1,911. Total, £17,625.

Craughwell Section—Tenanted, £8,627; untenanted, £355. Total, £8,982.

Loughrea Section—Tenanted, £78,961; untenanted, £171. Total, £79,132.

Derrybrien Section—Tenanted, £2,350; untenanted, none. Total, £2,350.

Woodford Section—Tenanted, £24,298; untenanted, £1,013. Total, £25,311.

Portumna Section—Tenanted, £68,202; untenanted, £1,187. Total, £69,389.

Eyrecourt Section—Tenanted, £35,365; untenanted, £57. Total, £35,422.

Total tenanted, £233,517: untenanted, £4,694. Total tenanted and untenanted, £238,211.

Solicitor for the owner: *Hutchinson Davidson.*

Solicitor for the Congested Districts Board: *J. O'Connor.*

J. E. W.

INDEX.

ABSOLUTE INTEREST—Bequest of money—Legatee to receive a sum monthly, with power to dispose by will of any portion remaining - - - - - 282
See WILL. 3.

—— Gift of income for life—Gift over on trusts which fail from invalidity—Life estate or absolute interest - - - 191
See WILL. 1.

—— Gift for life, with power of disposition superadded - - - - - - 205
See WILL. 2.

ACCELERATION—Gift by will of income of fund to widow until re-marriage—Gift of fund on her death—Re-marriage of widow - - - - - - 53
See WILL. 4.

ACQUIESCENCE—Sanitary authority—Right to monopoly in supply of water to district—Acquiescence in supply by adjoining district - - - - - 413
See LOCAL GOVERNMENT. 2.

—— Tied house—Knowledge by brewers that publican was dealing with other brewers
See LICENSING ACTS. [111, 130

ACTION—Cause of—Breach of statutory duty—Statute providing for making of regulations giving rights to a class—No regulations made - - - - - 216
See LOCAL GOVERNMENT. 1.

—— Right of—No special damage—Right of sanitary authority to monopoly in supply of water to district—Injunction 413
See LOCAL GOVERNMENT. 2.

—— Right of shareholder against director
See COMPANY. 2. [237, 249

—— Transfer to County Court—Action for specific performance of agreement to grant right of way - - - 259
See COUNTY COURT.

ADMINISTRATION — *Executor — Assets of Testator—Power of Executor to carry on Business—Right of Manager appointed by the Court to Indemnity out of General Assets—Right of Trade Creditors to Payment out of General Assets—Subrogation—Effect of carrying Fund to Separate Credit.*] A manager appointed by the Court in an administration action to carry on the business of a testator in the place of the executor, who had an implied power to carry it on, no particular assets being devoted by the will for that purpose, is entitled to be indemnified by the general assets against liabilities incurred by him in carrying on the business, and the trade creditors are consequently entitled to resort to such assets for payment of their debts. The fact that funds have been carried to the separate credits of legatees does not free such funds from liability in this respect. The effect of carrying funds to a separate credit considered. *O'Neill* v. *M'Grorty* [M.R., 1.

—— Annuity determinable on re-marriage—Deficiency of assets—Valuation 39
See ANNUITY.

AFFIDAVIT OF OWNERSHIP—Judgment mortgage—Statement of barony—Barony divided into two parts under County Treasurers (Ireland) Act, 1823. 276
See MORTGAGE. 1.

AGREEMENT.
See CONTRACT.

ANNUITY — *Determinable on Re-marriage — Deficiency of Assets—Valuation.*] A testator by his will bequeathed two annuities, one of which was payable to the testator's widow during her life while she remained a widow, and the other payable to the annuitant for life. The estate was solvent *quâ* creditors, but was insufficient to pay the two annuities in full. In administration proceedings one of the inquiries directed was what was the value of the widow's annuity. *Held*, that the value should be ascertained as if the annuity

ANNUITY—*continued.*
were a life annuity, and that after the amount representing such value had been rateably abated it should be invested in the purchase of a life annuity to be paid to the widow until re-marriage. *Carr* v. *Ingleby* (1 De G. & S. 362) followed. *In re Sinclair*, [1897] 1 Ch. 921, distinguished. *In re Richardson, Mahony* v. *Treacy* BARTON J. 39.

—— Direction to pay out of rents and profits—Charge on corpus - - 95, 99
See WILL. 5.

APPOINTMENT—Power of.
See POWER.

ARREARS OF RENT—Sale under Land Purchase Acts—Subsequent devise of real estate—Sum equivalent to one year's arrears of rent—Whether payable to devisee or to residuary legatee 20
See LAND PURCHASE ACTS. 1.

ASSETS—Business carried on by manager appointed by court—Right of trade creditors to payment out of general assets—Fund carried to separate credit.
See ADMINISTRATION. [1

—— Deficiency—Annuity determinable on re-marriage—Valuation - - 39
See ANNUITY.

BARONY—Judgment mortgage—Affidavit of ownership—Statement of Barony—Barony divided into two parts under County Treasurers (Ireland) Act, 1823
See MORTGAGE. 1. [276

BIDDINGS—Re-opening—Sale by court—Depreciatory conditions of sale - 29
See MORTGAGE. 2.

BONUS—Land Purchase Acts—Gift by will of property being sold to tenants and proceeds when sold - - - 213
See WILL. 8.

—— On settled shares—Capital or income 321
See TENANT FOR LIFE AND REMAINDERMAN.

BUSINESS—Manager appointed by court to carry on business of deceased—Right to indemnity out of general assets in respect of trade debts—Right of trade creditors—Subrogation—Effect of carrying fund to separate credit - - - 1
See ADMINISTRATION.

CAPITAL OR INCOME—Bonus on Shares—Dividend paid out of accumulated profits - - - - - 321
See TENANT FOR LIFE AND REMAINDERMAN.

CASES—*Attorney-General* v. *Tomline*, 14 Ch. D. 58, followed and applied - - 211
See SEA-SHORE.

—— *Bennett's Estate*, [1898] 1 I. R. 185, not followed - - - - - 304
See SETTLEMENT. 3.

—— *Boyle* v. *Boyle*, I. R. 11 Eq. 433, followed
See WILL. 1. [191

—— *Brown* v. *Harrison*, 35 I. L. T. R. 25, not followed - - - - - 191
See WILL. 1.

—— *Carr* v. *Ingleby*, 1 De G. & S. 362, followed
See ANNUITY. [39

—— *Chaplin* v. *Chaplin*, 3 P. Wms. 229, considered - - - - 387, 395
See RENTCHARGE. 1.

—— —— applied - - - 406
See RENTCHARGE. 2.

—— *Condon* v. *Mitchelstown Rural District Council*, [1914] 1 I. R. 113, 118, approved - - - - - - 216
See LOCAL GOVERNMENT. 1.

—— *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company*, [1895] 1 Ch. 629, followed 345, 358
See COMPANY. 1.

—— *De Hoghton* v. *De Hoghton*, [1896] 2 Ch. 385, followed - - - - 266
See SETTLEMENT. 1.

—— *Doherty* v. *Kennedy*, [1912] 1 I. R. 349, 363; [1914] A. C. 823. Effect of decision considered - - - 345, 358
See COMPANY. 1.

—— *Drew* v. *Barry*, I. R. 8 Eq. 260, considered - - - - 387, 395
See RENTCHARGE. 1.

—— *Franks' Estate, In re*, [1915] 1 I. R. 387, 395, distinguished - - - 406
See RENTCHARGE. 2.

—— *Greymouth Point Elizabeth and Coal Company, Limited, In re*, [1904] 1 Ch. 32, followed - - - 345, 358
See COMPANY. 1.

—— *Houston, In re*; *Rogers* v. *Houston*, [1909] 1 I. R. 319, followed - - 304
See SETTLEMENT. 3.

—— *Johnson, In re*, 68 L. T. 20, applied 53
See WILL. 4.

—— *Kirkpatrick* v. *King*, 32 I. L. T. R. 41, distinguished - - - - - 261
See WILL. 6.

—— *Knox, deceased, In re*; *Snodgrass* v. *Gamble*, [1910] 1 I. R. 20, followed - 191
See WILL. 1.

—— *Meyler* v. *Meyler*, 11 L. R. Ir. 522, not followed - - - - - 304
See SETTLEMENT. 3.

CASES—*continued.*

—— *Mowatt* v. *Castle Steel and Iron Works Company*, 34 Ch. D. 58, distinguished
See COMPANY. 1. [345, 358

—— *Phillips* v. *Gutteridge*, 3 De G. J. & S. 332, applied and followed - - 95, 99
See WILL. 5.

—— *R.* v. *Westmoreland County Court Judge*, *Ingleton* v. *Maudsley*, 36 W. R. 477, distinguished - - - - - 259
See COUNTY COURT.

—— *Sinclair*, *In re*, [1897] 1 Ch. 921, distinguished - - - - - 39
See ANNUITY.

—— *Snodgrass* v. *Gamble*; *In re Knox*, deceased [1910] 1 I. R. 20, followed - 191
See WILL. 1.

—— *Stewart*, *In re*, 41 Ch. D. 494, distinguished
See COSTS. 2. [185

—— *Stinson's Estate*, *In re*, [1910] 1 I. R. 319, followed - - - - - 304
See SETTLEMENT. 3.

—— *Taylor* v. *Roe*, [1894] 1 Ch. 413, followed and applied - - - - - 273
See COSTS. 1.

—— *Tremayne* v. *Rashleigh*, [1908] 1 Ch. 681, view of Eve J., that "bonus" under Land Purchase Acts is an interest in the lands, dissented from - - 213
See WILL. 8.

—— *Tringham's Trusts*, *In re*; *Tringham* v. *Greenhill*, [1904] 2 Ch. 487, followed 304
See SETTLEMENT. 3.

CAUSE OF ACTION.
See ACTION.

CHARGE—Presumption of extinguishment
See MERGER. [198, 330

CHARITY—Charitable bequest payable out of proceeds of sale of lands—Charities not administered in Ireland—Death of testator within three months—Failure of bequest - - - - - 191
See WILL. 1.

CHILD-BEARING—Woman past age of—Presumption - - - 198, 330
See MERGER.

CLASS—Gift to, by will—Codicil revoking share of one member—Augmentation of shares of the others - - - - 63, 70
See WILL. 7.

—— Relations—Power of appointment among nephews and nieces and other relations—Class within power—Class entitled in default of appointment—Time of ascertainment of class—Vesting - 42
See POWER.

CLASS—*continued.*

—— Time of ascertainment of—Gift of income of fund to widow until re-marriage—Gift of fund on her death to eldest sons of testator's brothers and sisters then living—Acceleration - - - - 53
See WILL. 4.

COMPANY—*Debentures—Quorum of Directors—Resolution to issue Debentures—Interested Directors voting—Validity of Debentures issued to Directors—Validity of Debentures issued to Outsiders without notice of Irregularity—Right of Holder of Invalid Debenture to rely on Trust Deed securing Debentures—Estoppel*—Res Judicata—*Test Action.*] By a deed executed in 1895 property of a company was conveyed to trustees for the holders of second debentures to be thereafter issued. The articles of association of the Company provided that no director should vote in respect of any matter in which he was individually interested. They fixed the quorum of directors at two. At a meeting of directors held on the 12th May, 1903, at which three directors (two of them being D. and K.) were present, it was resolved that certain second debentures should be issued in trust for D. and K. as security for advances made by them to the company, which debentures were subsequently issued. *Held*, by the Court of Appeal, affirming the decision of Barton J., that as D. and K. were interested parties, there was no quorum competent to vote on the resolution, and the resolution was invalid. *In re Greymouth Point Elizabeth Railway and Coal Company, Limited; Yuill* v. *Greymouth Point Elizabeth Railway and Coal Company, Limited*, [1904] 1 Ch. 32, followed. At a meeting of directors, held on the 16th May, 1903, at which five directors (including C. and T.) were present, each of the directors present agreed to advance a certain sum to provide new plant, and it was resolved to issue certain second debentures in trust for those making such advances, as security for the same. At a meeting of directors held on the 25th June, 1903, at which C. and T. were not present, these debentures were issued. *Held*, by the Court of Appeal, affirming the decision of Barton J., that the resolution of the 16th May was invalid, and that the debentures issued to C. and T., having been issued in pursuance of that resolution, were void, notwithstanding that C. and T. were not present at the meeting at which the debentures were issued. At a meeting of directors held on the 20th January, 1904, at which K., D., and H. were the directors present, it was resolved to issue certain second debentures in trust for persons making advances to the company, as security for such advances, and in pursuance of this resolution second debentures were issued in trust for C. and T. (directors). In

COMPANY—*continued.*
pursuance of the same resolution second debentures were also issued to K. and D. *Held*, by the Court of Appeal, affirming the decision of Barton J., that the resolution of the 20th January, 1904, was invalid, and that the debentures issued to C. and T. in pursuance of it were void. *Held*, also, by the Court of Appeal, affirming the decision of Barton J., that the holders of the void debentures could not claim the benefit of the trust deed of 1895. The effect of the decision in *Doherty* v. *Kennedy*, [1912] 1 I.R. 349, 363; [1914] A.C. 823, as to the right of a holder of invalid debentures to rely on the trust deed securing them, considered. In pursuance of the resolutions of the 16th May, 1903, and 20th January, 1904, certain second debentures were issued in trust for persons who were outsiders, and had no notice of any irregularity in the resolutions. *Held*, by the Court of Appeal, affirming the decision of Barton J., that such debentures were valid, and that their validity could not be questioned either by the company or the holders of other second debentures. *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company*, [1895] 1 Ch. 629, followed. *Mowatt* v. *Castle Steel and Iron Works Company*, 34 Ch.D. 58, distinguished. In the course of the present action, which was brought by a holder of first debentures, D. and K. applied to the judge for liberty to institute a joint action to establish their rights in respect of (*inter alia*) the second debentures issued to them. An order was made on this application, giving D. liberty to proceed with an action against the trustees of the second debenture holders and the company, for the purpose of establishing the rights of the applicants. The action was brought by D. in his own name alone, and dealt with his own rights only. It resulted in a judgment in his favour as regarded his debentures. The validity of the debentures issued to K., C., and T. having been challenged in the present proceeding by the other second debenture holders and by the liquidator of the company: *Held*, by Barton J., that the judgment in D.'s action could be relied on by K, but not by C. or T., by way of estoppel. *Held*, by the Court of Appeal, reversing the decision of Barton J., that K. could not rely on this judgment by way of estoppel. What is necessary to constitute a test action, considered. *Cox* v. *Dublin City Distillery* (No. 2)
BARTON J., 345; APP., 358

2.—— *Shareholders—Action by, against Director and Company—Contract made by Director for Work to be done by Company—Retention of Moneys received—Agreement with Co-Directors not to account—Internal Management—Powers of Majority—Ultra Vires.*] The managing director of a limited company carrying on a laundry business entered into contracts for laundry work in his own name on behalf of the company with a customer. The work was done by the company, and the director received the amounts due under the contracts, and paid over a portion to the company, but did not account for the amounts received by him. This was in consequence of an alleged arrangement with his co-directors that he was not to account for profits. The company declined to call upon the director for an account, whereupon two shareholders brought an action against the company and the director, claiming that the director was a trustee for the company of all moneys received under the contracts, and asking for an account. The company pleaded that the complaint was conversant with a matter of internal management over which the Court had no jurisdiction. The defence of the director was that if there was any cause of complaint against him, which he did not admit, it was only enforceable at the suit of the company. *Held*, by the Master of the Rolls, that the complaint was a matter of internal management, and that the action could not be sustained. *Held*, by the Court of Appeal, that the transaction was illegal and ultra vires, and (reversing the decision of the Master of the Rolls) that the action was maintainable, and the plaintiffs entitled to the relief sought. *Cockburn* v. *Newbridge Sanitary Steam Laundry Company, Limited* - - - M. R., 237; APP., 249

COMPULSORY PURCHASE — Land Purchase Acts—Costs of sale—Discretion of Judicial Commissioner - - 169
See LAND PURCHASE ACTS. 4.

—— Land Purchase Acts—Value of money—Date at which to be taken in fixing price 422
See LAND PURCHASE ACTS. 3.

CONDITIONS OF SALE—Sale by Court—Depreciatory conditions — Re-opening biddings - - - - 29
See MORTGAGE. 2.

CONSENT—Acquiescence amounting to 413
See LOCAL GOVERNMENT. 2.

CONSIDERATION—Contract in restraint of trade—tied house - - 111, 130
See LICENSING ACTS.

—— Voluntary Settlement — Subsequent marriage—*Ex post facto* consideration
See SETTLEMENT. 1. [266

CONTEMPT OF COURT—Committee of Council of Incorporated Law Society—Charge of professional misconduct against solicitor—Destruction of material documents by solicitor charged - - - 152
See SOLICITOR.

CONTINGENT REMAINDER — Interposed between life estate and remainder in fee —Merger - - - 198, 330
See MERGER

CONTRACT—Illegality—Agreement in contravention of licensing laws — Illegality appearing on face—Illegality not pleaded —Agreement in restraint of trade—Consideration—Tied house
See LICENSING LAWS. [111, 130

—— Illegality—Agreement that director of company need not account for moneys received—Right of action by shareholder
See COMPANY. 2. [237, 249

CORPUS—Charge on—Direction to pay annuity out of rents and profits - - 95, 99
See WILL. 5.

COSTS — *Taxation — Interlocutory Order directing Payment of Costs—Interest as from date of Order—Rules of Supreme Court, Ireland,* 1905, *Order XLII, Rule* 15. An interlocutory order directing the payment of costs by one person to another carries interest on the costs thereby awarded, as from the date of such order. *Taylor* v. *Roe,* [1894] 1 Ch. 413, followed and applied. *Alexander* v. *Curragh.* [BARTON J., 273

2. —— *Taxation—Scale Fee—Sale under Lands Clauses Acts—Costs of Purchaser's Solicitor—Solicitors' Remuneration Act,* 1881 (44 & 45 *Vict. c.* 44)—*General Order,* 1884, *Sched. I, Part I, Rule* 11. The scale in Schedule I, Part 1, of the Irish General Order of 1884, made under the Solicitors' Remuneration Act, 1881, does not apply to the costs of the solicitor for the purchaser in sales under the Lands Clauses Consolidation Act. *In re Stewart,* 41 Ch.D. 494, distinguished. *In re D. & T. Fitzgerald* - - - - [BARTON J., 185

3. —— *Taxation—Scale Fee—Solicitor and Client —Same Solicitor acting for Vendor and Purchaser—Solicitors' Remuneration Act,* 1881 (44 & 45 *Vict. c.* 44)—*General Order,* 1884, *Schedule I, Part* 1, *Schedule II.* Solicitors, acting for a vendor of lands sold by public auction, subsequently acted for the purchaser also. The sale having been completed, they served the purchaser with a bill of costs in which they charged him with the scale fee provided by Schedule I, Part 1, of the General Order, 1884, under the Solicitors' Remuneration Act, 1881. Objections to the bill of costs were lodged by the purchaser, on the ground that the solicitors "could not properly and necessarily, and having regard to their duty as solicitors for both vendor and purchaser, perform all the work prescribed by Schedule I, Part 1, so as to entitle them to the scale remuneration." The taxing master disallowed the objections, finding that "the solicitors for the purchaser did all the work required under the schedule on his behalf." On a summons to review: *Held,* that, in view of the taxing master's finding of fact, no sufficient grounds had been shown for reviewing his decision. *In re Best & Best.* [BARTON J., 58

—— Land Purchase Acts — Compulsory purchase — Costs of sale — Discretion of Judicial Commissioner - 169
See LAND PURCHASE ACTS. 4.

—— Order of Court directing taxing officer to select parties to get costs—Registration of order as judgment mortgage—Validity.
See MORTGAGE. 2. [29

COTTAGE—Labourer's—Right of preference—Labourers (Ireland) Acts - 216
See LOCAL GOVERNMENT. 1.

COUNTY COUNCIL.
See under LOCAL GOVERNMENT.

COUNTY COURT — *Jurisdiction — Suit for Specific Performance of Agreement to grant Right of Way—County Officers and Courts (Ireland) Act,* 1877 (40 & 41 *Vict. c.* 56), *s.* 33 (*d*), *s.* 36. The jurisdiction conferred on the County Court by sect. 33 (*d*) of the County Officers and Courts (Ireland) Act, 1877, in suits for specific performance, includes a suit for the specific performance of an agreement in writing for good consideration to grant a right of way as appurtenant to a holding, and, accordingly, an action in the Chancery Division claiming such specific performance may, if otherwise within the County Court jurisdiction, be transferred to the County Court under sect. 36 of the County Officers and Courts (Ireland) Act, 1877. *R.* v. *Westmoreland County Court Judge, Ingleton* v. *Maudsley,* 36 W.R. 477, distinguished. *M'Ardle* v. *Kane* [M. R., 259

DEBENTURES — Resolution to issue—Interested directors voting—Validity of debentures—Right of holder of invalid debenture to rely on trust deed securing debentures - - - 345, 358
See COMPANY. 1.

DEED—Construction—Absence of words of inheritance—Intention—Equitable estate in fee - - - - - - 304
See SETTLEMENT. 3.

DIRECT LABOUR—Workmen employed by county council on roads — National Insurance Act — Exceptions—Employment under local authority—Sickness and disablement benefits - 79
See INSURANCE (NATIONAL).

DIRECTOR — Company — Agreement director need not account for moneys received—Illegality—Right of action by shareholder - - - - - 237, 249
See COMPANY. 2.

—— Company—Quorum of directors—Interested Director voting on resolution—Validity of resolution - - - 345, 358
See COMPANY. 1.

DISABLEMENT BENEFITS—National Insurance — Employment under Local Authority - - - - - 79
See INSURANCE (NATIONAL).

DIVIDEND—Paid out of accumulated profits—Bonus—Capital or income - 321
See TENANT FOR LIFE AND REMAINDERMAN.

ELECTION—Power of appointment—Appointment void for remoteness—Election 315
See SETTLEMENT. 2.

EMPLOYER AND WORKMAN—National Insurance Act — Exceptions — Employment under Local Authority—Sickness and disablement benefits — Workmen employed by county council on road maintained by direct labour - 79
See INSURANCE (NATIONAL).

ESTATE FOR LIFE—Ultimate Remainder in fee—Contingent remainder interposed—Merger - - - 198, 330
See MERGER.

—— Will—Gift for life with power of disposition superadded - - - 205
See WILL. 2.

—— Will—Gift of income for life—Gift over on trusts which fail from invalidity 191
See WILL. 1.

ESTATE IN FEE-SIMPLE — Absence of words of inheritance in deed—Intention—Equitable estate in fee - 304
See SETTLEMENT. 3.

ESTATE TAIL—In Rentcharge created *de novo*—Effect of barring entail 387
See RENTCHARGE. 1, 2. [395, 406

ESTOPPEL—Res judicata—Test action 345, [358
See COMPANY. 1.

EXECUTOR—Executor carrying on business under implied power in will—Right to indemnity out of general assets—Fund carried to separate credit - 1
See ADMINISTRATION.

EXPRESS TRUST—Legacy charged on land—Statute of Limitations - 285
See LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891.

EXTINGUISHMENT OF CHARGE.
See MERGER.

FORESHORE.
See SEA-SHORE.

GIFT OVER—After invalid bequest - 191
See WILL. 1.

GRAVEL—Removal from foreshore—Nuisance—Injunction - - - - 210
See SEA-SHORE.

HEIRS—Bequest of chattel real—Gift over on death without heirs to person capable of being heir - - - - 261
See WILL. 6.

—— Deed—Limitations of equitable estates—Omission of word "Heirs"—Estate for life or in fee simple—Intention 304
See SETTLEMENT. 3.

ILLEGALITY—Agreement in contravention of Licensing Laws—Illegality appearing on face—Illegality not pleaded—Contract in restraint of trade — Consideration — Tied house - - - 111, 130
See LICENSING ACTS.

—— Agreement that director of company need not account for moneys received—Right of action by shareholder - 237, 249
See COMPANY. 2.

INCOME—Capital or income—Bonus on shares — Dividend paid out of accumulated profits - - - - - - 321
See TENANT FOR LIFE AND REMAINDERMAN.

INCORPORATED LAW SOCIETY — Committee of council — Nature of proceedings before, on charge of professional misconduct against a solicitor—Destruction of material documents by solicitor charged—Contempt of Court - 152
See SOLICITOR.

INDEMNITY—Manager appointed by Court to carry on business of deceased—Right to indemnity out of general assets in respect of trade debts—Effect of carrying fund to separate credit - 1
See ADMINISTRATION.

INFANT—*Practice—Jurisdiction to make Orders as to Guardianship and Maintenance of Infants on Originating Summons—All Originating Summonses in Minor Matters now assigned to Lord Chancellor—Order V, Rule 2—Order LV, Rule* 3 (7), (8), (9). There is jurisdiction upon an originating summons to make an order as to the guardianship and care, maintenance or advancement, of infants, and thereby to make them wards of Court. In future all originating summonses in minor matters or relating to the property of minors, brought

INFANT—*continued.*
under Order LV, Rule 3 (7), (8), (9), will be assigned to the Lord Chancellor, subject, however, to the provisions of Order V, Rule 2 (*k*). *In re Cunninghams, Infants* - - - APP. 380

INHERITANCE—Absence of words of in deed —Intention—Equitable estate in fee
See SETTLEMENT. 3. [304

INJUNCTION—Removal of gravel from foreshore - - - - - - 210
See SEA-SHORE.

—— Sanitary authority — Right to monopoly of supply of water in district—Acquiescence in supply by adjoining district — Effect of injunction to deprive troops of proper supply of water - - - 413
See LOCAL GOVERNMENT. 2.

INSURANCE (NATIONAL) — *National Insurance Act*, 1911 (1 & 2 *Geo.* 5, *c.* 55, *s.* 8 (1) (*c*) (*d*); *First Schedule, Part II* (*b*)—*Sickness Benefit—Disablement Benefit — Exceptions — Employment under Local Authority—County Council, Powers of — Terms of Employment — Execution of Works otherwise than by Contract—Maintenance of Roads by Direct Labour—Local Government* (*Procedure of Councils*) *Order*, 1890, *Art.* 25 (A)—*Superannuation of Officers—Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37), *ss.* 83, 109 — *Meaning of* "*Officer.*" Part II (*b*) of the first schedule to the National Insurance Act, 1911, excepts from the provisions of the Act an employment under a local authority, where the Insurance Commissioners certify that the terms of the employment are such as to secure provision in respect of sickness and disablement on the whole not less favourable than the corresponding benefits conferred by Part I of the Act. Under Part I of the Act a disablement benefit is a periodical payment so long as the insured is rendered incapable of work, and has not attained the age of seventy. *Held*, that a county council has no power to give to workmen employed on roads under a system of direct labour terms of employment securing to them provision in respect of disablement as favourable as that conferred by Part I of the Act, and that a county council cannot, therefore, as regards such workmen, bring itself within the exception in Part II of the first schedule. Such workmen are not "officers" within s. 83, sub-s. 11, of the Local Government (Ireland) Act, 1898. *Tipperary County Council* v. *Irish Insurance Commissioners* - - - - M.R., 79

INTEREST—Charges in equal priority affecting purchase-money of lands sold under Land Purchase Acts — Varying amounts due for arrears of interest—Deficiency of purchase-money - - - 27
See LAND PURCHASE ACTS. 2.

INTEREST—*continued.*
—— Interlocutory order directing payment of costs —Time from which interest runs 273
See COSTS. 1.

IRISH LAND COMMISSION — Compulsory purchase — Costs of sale—Discretion of Judicial Commissioner - - 169
See LAND PURCHASE ACTS. 4.

ISSUE — Possibility of, extinct — Woman past age of child-bearing - - 198, 330
See MERGER.

JOINTURE—Prima facie, meaning of—Power to appoint jointure — Appointment of rentcharge during life of husband 266
See SETTLEMENT. 1.

JUDGMENT MORTGAGE.
See MORTGAGE.

JUDICIAL COMMISSIONER — Land Purchase Acts—Compulsory purchase—Costs of sale—Discretion - - - 169
See LAND PURCHASE ACTS. 4.

LABOURERS (IRELAND) ACTS.
See under LOCAL GOVERNMENT.

LAND PURCHASE ACTS—*Arrears of Rent —Sale by landlord to tenants—Subsequent devise of real estate by landlord—Sum equivalent to one year's arrears of rent—Whether payable to devisee or to residuary legatee—Irish Land Act*, 1903 (3 *Edw.* 7, c. 37), *s.* 24, *sub-s.* 8.] A testator, who was the absolute owner of real estates, by his will, executed in 1899, devised these estates to *R. S.* for life, with remainder to his first and other sons in tail male, with remainders over, and appointed *J. S.* his residuary legatee. In January, 1906, the testator entered into agreements under the Irish Land Act, 1903, for the sale of the estates to his tenants. On the 7th February, 1906, the testator executed a codicil which effected a republication of the will, and operated as a bequest of the purchase-money upon the trusts applicable to the real estates devised by the will (see *Steele* v. *Steele*, [1913] 1 I. R. 292, 299). The final schedule of incumbrances in the Land Commission matter comprised, at item "A," a sum equivalent to the arrears of rent due at the date of the agreements for purchase of the holdings, but not exceeding one year's rent, payable in pursuance of sect. 24, sub-s. 8, of the Irish Land Act, 1903. *Held*, that this sum was payable to the residuary legatee, and did not pass under the devise of the lands. *Steele* v. *Steele* (No. 2) [BARTON J., 20

2.——*Charges in equal Priority affecting the Purchase-money of Lands sold under the said Acts—Varying Amounts due for Arrears of Interest thereon—Deficiency of Purchase-money—Procedure regarding Payment.*] Where there are charges in

LAND PURCHASE ACTS—*continued.*
equal priority affecting the purchase-money of lands sold under the Land Purchase Acts, with varying amounts due thereon for arrears of interest, and the purchase-money is insufficient to satisfy the claims, on allocation the amounts due for arrears of interest will, in the absence of special grounds, first be paid in full, and the balance of the purchase-money distributed in proportion to the capital value of the charges. *In re Carroll's estate* - - WYLIE J., 27

3.——*Compulsory Purchase — Application by Owner to fix price—Value of Money—Date as of which taken—Irish Land Act*, 1909 (9 *Edw.* 7, *c.* 42), *s.* 63 (2).] On an application, by way of objection, to the Judicial Commissioner to fix the price to be paid for an estate or untenanted land acquired under the compulsory provisions (Part IV) of the Irish Land Act, 1909, the price will be fixed having regard to the value of money as of the date of the hearing of such application. *In re Clanricarde's estate* - - WYLIE J., 422

4.——*Compulsory Purchase—Costs of sale—Discretionary power to award—Exercise of Discretion—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), s. 50—*Irish Land Act*, 1909 (9 *Edw.* 7, *c.* 42), *Part IV—Land Commission Rules of March*, 1897, *Order XLVI, Rule* 1.] The Judicial Commissioner, in exercising his discretionary power to grant or refuse to an owner, whose lands have been compulsorily acquired by the Land Commission under the provisions of Part IV of the Irish Land Act, 1909, the costs of the sale as against the Land Commission, is not bound by any overriding principle of law entitling the owner to be allowed such costs in the absence of special reasons for disallowing them. *In re Lord Inchiquin's estate* (No. 2) - - - - - - APP. 169

—— "Bonus"—Not an interest in the lands nor part of the proceeds of sale—Gift by will of property being sold to tenants, and proceeds when sold - - - 213
See WILL. 8.

—— Purchaser registered as owner subject to equities — Jurisdiction of registering authority to cancel note as to equities where no burdens affecting land 285
See LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891.

LAND REGISTRY.
See under LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891.

LANDLORD AND TENANT—Tenancy at will—Implication of—Determination of —Statute of Limitations - - 296
See LIMITATIONS, STATUTE OF.

LANDS CLAUSES ACTS — Sale under — Costs of purchaser's solicitor—Scale fee
See COSTS. 2. [185

LEGACY—Charged on land—Express trust — Statute of Limitations - - 285
See LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891.
See also under WILL.

LICENSING ACTS—*Agreement in Contravention of—Attempt to create Property in Licence apart from Premises—Agreement for Transfer of Licence from one House to Another—Agreement to deal exclusively with Firm of Brewers for Porter to be sold in House to which Licence transferred, and to deposit Licence with Brewers to be at their Disposal —Transfer by Licensing Authority—Invalidity of Transfer — Illegality of Agreement — Agreement illegal on Face—Illegality not pleaded—Breach of Agreement—Acquiescence—Tied House—Contract in Restraint of Trade—Consideration—Agreement to take fixed quantity of Porter—Establishment by Brewers of another Tied House in Neighbourhood.*] By an agreement dated the 5th July, 1892, purporting to be made between the plaintiffs, a brewery company, and the defendant, the occupier of a house in D. Street, in the borough of C., it was recited that the company were beneficial owners of a licence for a house in B. Street, and that the defendant had requested the company to allow her to apply for a transfer of the licence to the house in D. Street to her own name, and to sell thereunder, to which the company agreed on her undertaking to pay them the sum of £300 secured by a bond executed by her contemporaneously, and the defendant thereby agreed to take all necessary steps to have the licence transferred to her own name, and to the house in D. Street, and to maintain the licence in full force, and to renew it, and to endorse and deposit it with the company, to be transferred by her to such other person and house as the company might name, the £300 to be repaid to defendant on such transfer being obtained from the licensing authority. The defendant further agreed, while licensed, to deal exclusively with the company for all porter, and for all stout so long as they should brew and vend stout, which she should sell on the premises or elsewhere under colour of the licence, and also to purchase from the company four tierces of porter in every month, and the company agreed to supply her while licensed with such quantity of good merchantable porter, and, so long as the company should brew and vend stout, such quantity of good merchantable stout, as she might require, on being paid in cash therefor the price usually charged to customers. The agreement was executed by the defendant under seal, but was not executed by the company. The company had purchased the licence of the

LICENSING ACTS—*continued.*

house in B. Street (apart from the house itself) for £160 in 1891, and the defendant had obtained at quarter sessions an interim transfer of this licence to the house in D. Street at the licensing sessions in June, 1892, which was confirmed at the annual licensing sessions in October, 1892. The defendant dealt with the company for porter, but only to a very small extent for stout, which she procured almost exclusively from another brewery, and in 1907 she entered into an agreement with this other brewery to sell its bottled stout exclusively. Throughout there was painted on the outside of her shop, "J. L. Murphy & Co.'s XX Stout." The plaintiffs were aware for a long time that the defendant was selling some stout of the other brewery, but did not know that she was selling it in large quantities till shortly before bringing the present action, which claimed damages for breach of the agreement of the 9th July, 1892, and an injunction to restrain the defendant from selling porter and stout other than that manufactured by the plaintiffs. The defendant pleaded want of and illegality of consideration, unreasonable restraint of trade, laches, and acquiescence. There was no plea that the agreement, apart from the consideration, was illegal. *Held*, by the Master of the Rolls, that there was good and legal consideration for the agreement by the defendant to deal exclusively with the plaintiff company for porter and stout; that such agreement was not an unreasonable restraint of trade; that there was no such acquiescence on the part of the plaintiffs as would debar their right to the injunction sought, and that such injunction should be granted. After the date of the agreement of 1892, the plaintiffs acquired another licensed house in the immediate neighbourhood of the defendant's and established it as a tied house. *Held*, by the Master of the Rolls, that this did not relieve the defendant from her obligation to take the agreed quantity of porter from the plaintiffs. *Held*, by the Court of Appeal, that the action should be dismissed. *Held*, by O'Brien L.C. and Holmes L.J., that the dominant object of the agreement was an attempt to create property in a licence apart from the premises, in contravention of the licensing laws, and that the agreement was therefore illegal and not enforceable. *Held*, by Palles C.B., that the transfer of the licence to the plaintiff by the licensing authority was made without jurisdiction and was void; that the effect of the agreement was to provide for the carrying on of a publican's trade under a document purporting to be a licence, which was mere waste paper, with an obligation on the defendant at the plaintiffs' request to transfer the licence to any house directed by them, and that such an agreement was illegal; that if there had been any valuable consideration for the agreement, it consisted in assistance in procuring a void licence; that the illegality pervaded the entire agreement, both the consideration and the promises; and that even assuming that the consideration had been legal, the promise sought to be enforced was illegal, being a promise to purchase from the plaintiffs porter and stout with a view to their being sold illegally. *Held*, also, by the Court of Appeal, that as the illegality of the agreement appeared on its face, it was not necessary that such illegality should have been pleaded. *James L. Murphy & Co., Ltd.* v. *Crean*

[M. R., 111; App. 130

LIFE ESTATE.

See ESTATE FOR LIFE.

LIMITATION—Absence of words of, in Deed—Intention—Equitable estate in fee 304

See SETTLEMENT. 3.

LIMITATIONS, STATUTE OF—*Landlord and Tenant—Tenancy at Will—Determination of—Real Property Limitation Act*, 1833 (3 & 4 *Wm.* 4, c. 37), s. 7. A tenancy at will may be implied where a person enters into and remains in occupation of lands and the enjoyment of profits, by arrangement with the owner, without payment of rent, and not as agent, or under any express contract of tenancy. If the owner visits the lands in the character of owner, and exercises rights of ownership *animo possidendi*, such visits may prevent the Statute of Limitations from running in favour of the tenant at will. A, being absolutely entitled to lands subject to a jointure payable to his mother, by deed executed in the year 1897, and duly registered, conveyed the lands to his mother; but, by her permission, he continued to reside on the lands. He paid his mother her jointure by instalments, and was never asked to account for the surplus profits. His mother paid him periodical visits, lasting for several weeks at a time. On these occasions she assumed the character of owner, gave directions as to household and family arrangements, and was addressed and treated as "the mistress." *Held*, that A occupied the lands as tenant at will to his mother, and that his mother's visits determined the tenancy at will so as to prevent the Statute of Limitations running in favour of A. *Woodhouse* v. *Hooney* - - - - BARTON J., 296

—— Legacy charged on Land—Express Trust

[285

See LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891.

LOCAL GOVERNMENT—*Labourers (Ireland) Acts—Labourer's Cottage—Preference on First Letting—Right to Particular Cottage—Discretion of District Council—Letting to Labourer on whose*

LOCAL GOVERNMENT—*continued.*

behalf no Representation had been signed — Labourers (Ireland) Act, 1906 (6 *Edw.* 7, *c.* 7), *s.* 29—*Effect of Section apart from Regulations made under it.* A district council had acquired land under an improvement scheme made under the Labourers (Ireland) Acts, and founded on "representations" made by certain agricultural labourers, of whom the plaintiff was one. When eight cottages, out of a large number comprised in the scheme, had been built, the council allotted one of them to K., an agricultural labourer, who had not signed any of the representations on which the scheme was founded, but whose needs were more urgent than the plaintiff's. Prior to the erection of the remaining cottages under the scheme the plaintiff brought an action against the council for a declaration that, under sub-s. 2 of s. 29 of the Labourers (Ireland) Act, 1906, he was entitled to a preference as against K., or any other person on whose behalf no representation was lodged, to be admitted as tenant on the first letting of the cottage, and claiming possession and an injunction and damages. *Held*, affirming the decision of the Court of Appeal in Ireland, [1914] 1 I. R. 208, that the plaintiff's action was not maintainable. *Held*, by Viscount Haldane L.C., Lord Dunedin, Lord Atkinson, Lord Parker of Warrington, and Lord Parmoor, that the plaintiff had not a preferential right to any particular cottage. *Condon* v. *Mitchelstown Rural District Council*, [1914] 1 I. R. 113, 118, approved. *Held*, by Lord Dunedin, Lord Atkinson, Lord Sumner, and Lord Parmoor, that the preference on the first letting of cottages to labourers on whose behalf representations have been made, referred to in s. 29 of the Labourers (Ireland) Act, 1906, is not an absolute preference, but only a preference *caeteris paribus*. *Quaere*, per Lord Atkinson, does s. 29, apart from regulations made under it, confer a right of preference? *Marron* v. *Cootehill (No. 2) Rural District Council* - - H. L., 216

2.——*Sanitary Authority — Water Supply— Supply and Sale of Water to Persons in Adjoining Districts—Injunction—Consent—Acquiescence—Infringement of Statutory Right—No Special Damage —Right of Action of Party aggrieved—Injunction which would prevent Supply of Water to Troops— Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *ss.* 61, 71—*Public Health (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 55), *s.* 2. By sect. 61 of the Public Health (Ireland) Act, 1878, an urban or rural sanitary authority may provide its district with a supply of water for public purposes, and for such purposes may construct and maintain waterworks, and may contract with any person for a supply of water. By sect. 2 of the Public Health (Ireland) Act, 1896, any sanitary authority may, with the consent of the sanitary authority of any adjoining district, supply and sell water to any person in an adjoining district. The defendants, an urban sanitary authority, had constructed waterworks for the supply of their district, and in the year 1907 they entered into a contract with the Secretary for War for the supply of water to military barracks in an adjoining district of which the plaintiffs were the rural sanitary authority. No formal consent, under seal, to this had been given by the plaintiffs, but they had full notice of the defendants' intention to supply the water to the barracks, and acquiesced in its being supplied, on the faith of which acquiescence the defendant incurred expenditure. The plaintiffs now brought an action claiming an injunction to restrain the defendants from supplying water to persons within the plaintiffs' district without the consent of the plaintiffs. *Held*, that the effect of the Public Health (Ireland) Acts, 1878 and 1896, is to give to each sanitary authority a monopoly in the supply of water to its own district, and that the violation of this monopoly by another sanitary authority is actionable without proof of special damage. But *held*, that in the present case there was acquiescence by the plaintiffs amounting to consent, and that, therefore, the action was not sustainable. *Held*, also, that even if the action had not been unsustainable on this ground, the Court would not, under present circumstances, grant an injunction which would have the effect of depriving His Majesty's troops of a good and wholesome supply of water. *Birr (No. 1) Rural District Council* v. *Birr Urban District Council.* [M.R., 413

—— National Insurance Act—Exceptions—Employment under Local Authority—County Council—Maintenance of roads by direct labour — Power to give disablement benefits to labourers—"Officer." 79

See INSURANCE (NATIONAL).

LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891 — *Registration subject to Equities—Jurisdiction of Registering Authority to cancel Note as to Equities where no Burdens to be entered—Statute of Limitations—Legacy charged on Land—Express Trust—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 8, 10—*Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8—*Judicature (Ireland) Act*, 1877 (40 & 41 *Vict. c.* 57), *s.* 28, *sub-s.* 2—*Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *s.* 29. Sect. 29, sub-s. 2, of the Local Registration of Title (Ireland) Act, 1891, provides for dispensing, on first registration of a person as owner of lands purchased under the Land Purchase Acts, with the ascertainment of burdens arising from the interest vested in the purchaser being deemed a graft upon his

LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891—*continued.*
previous interest, in which case (sub-s. 3) the registering authority is to note on the register that the registration is made subject to equities arising from the interest vested in the purchaser being deemed such graft. By sub-s. 4, the registered owner may apply to the registering authority to ascertain and enter on the register any burdens the ascertainment of which may have been so dispensed with, and the registering authority "shall thereupon ascertain and enter such burdens on the register, and shall cancel such note as aforesaid." *Held*, that the registering authority has jurisdiction to cancel the note as to equities, not merely where burdens are ascertained and entered, but also where it appears that there are no burdens. A testator left a farm to A, adding, "I direct that he shall pay the following legacies which I hereby charge upon my said farm," the legacies being set out. He appointed A sole executor. The testator died in 1891, and A proved the will, and went into possession of the farm. He subsequently purchased it under the Land Purchase Acts, and, in 1905, was registered in the Land Registry as owner, subject to equities. A died, having devised the lands to B, and appointed B executor. No payment had ever been made on account of the legacies, or any acknowledgment given in respect of them. There were no other charges on the lands. B applied to the registering authority to have the note as to equities cancelled. *Held*, that the legacies were not secured by an express trust; that, even if they had been so secured, the claims of the legatees were barred as against the lands by sect. 10 of the Real Property Limitation Act, 1874, and that B was entitled to have the note as to equities cancelled. *In re Hazlette.* [APP., 285

LORD CHANCELLOR—Assignment of originating summonses in minor matters to
See INFANT. [380

MERGER—*Extinguishment of Charge on Inheritance—Estate for Life and Ultimate Remainder in Fee—Interposed Contingent Remainder in favour of Issue—Possibility of Issue extinct.*] Lands were limited by will to A for life, with remainder to her issue as she should appoint, with remainder as she should appoint generally, with an ultimate remainder to A in fee. On the testator's death A became also absolutely entitled to a charge on the lands. A died a spinster aged over seventy years, having by her will devised her real estate and bequeathed her personal estate to different persons, without mention of the charge, and without having indicated any intention during her life either to keep the charge subsisting or to extinguish it. *Held*, by the Court of Appeal (affirming the decision of Ross, J.), that A had,

MERGER—*continued.*
at the date of her death, such an estate in the lands as to admit of the making of the presumption that the charge had become extinguished, and that, as it was a matter of indifference to her during her life whether the charge was kept subsisting or not, the presumption of extinguishment should be made. *In re Toppin's Estate*
[ROSS, J., 198; APP. 330

MINOR
See INFANT.

MISCONDUCT—Professional—Solicitor 152
See SOLICITOR.

MONEY—Value of—Compulsory purchase under Land Purchase Acts—Date at which to be taken in fixing price - 422.
See LAND PURCHASE ACTS. 3.

MORTGAGE—*Judgment Mortgage—Affidavit of Ownership—Statement of Barony—Barony divided into two parts under County Treasurers (Ireland) Act*, 1823 (4 *Geo.* 4, *c.* 33), *s.* 17—*Judgment Mortgage (Ireland) Act*, 1850 (13 & 14 *Vict. c.* 29), *s.* 6. An affidavit for the purpose of registration of a judgment under the provisions of the Judgment Mortgage Act, 1850 (13 & 14 Vict. c. 29), stated that the lands of the debtor were situated in the barony of Upper Iveagh, and county of Down. The barony of Upper Iveagh had been divided into two parts by the grand jury of the county at the Spring Assizes of 1824, in accordance with the powers conferred on them by section 17 of the County Treasurers (Ireland) Act of 1823. These two parts or divisions were known as Upper Iveagh, Upper Half, and Upper Iveagh, Lower Half. *Held*, that the division of the barony of Upper Iveagh into two parts did not constitute these parts distinct baronies, and that, therefore, the lands of the debtor were properly described in the judgment creditors' affidavit as situate in the barony of Upper Iveagh. *Gregg & Co. v. Boyd*
[BARTON, J., 276

2.——*Judgment Mortgage—Registration—Joint Judgment—One Affidavit including Several Parcels of Land belonging to Different Owners—Order of Court directing Taxing Officer to select Parties to get Costs—Registration of Order as Judgment Mortgage—Validity—Sale of Lands through Court—Investigation of Title before Sale—Depreciatory Conditions—Re-opening Biddings—Judgment Mortgage Act*, 1850 (13 & 14 *Vict. c.* 29), *sect.* 6—*Sales by Auction Act*, 1867 (30 & 31 *Vict. c.* 43)—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *sect.* 70.] In an action by several joint plaintiffs against several joint defendants to determine the right to take seaweed on a certain portion of the seashore, judgment was given in favour of the defendants, with a direction in the order that the taxing officer

MORTGAGE—*continued.*
should select whether two or three of the said defendants should get their costs. The taxing officer having selected three of such defendants, judgment for the amount of their taxed costs was registered as a judgment mortgage against three several separate parcels of land, belonging respectively to three of the plaintiffs in that action, upon a single affidavit made by one of such three defendants. Afterwards, upon an originating summons, the said defendants obtained an order declaring that the said judgment mortgage was well charged on the said lands, and a direction for the sale of one of such parcels. The judgment debtors did not appear on this application, and no appeal was taken from the order. The parcel was sold at a sum exceeding the price reserved, and only 5 per cent. below the valuation obtained for the purpose of the sale, but under conditions which were in fact depreciatory. The sale was confirmed by the Chief Clerk. Subsequently, by leave of the Court, James Brown, the owner of the parcel, applied for an order that the sale be set aside and declared void, and no steps taken in respect of the re-sale thereof until the ownership had been finally decided. *Held*, by the Court of Appeal, that the order of Barton J., declaring the judgment mortgage well charged on the lands, not having been appealed from, was conclusive as to the validity of the registration. *Held*, also, that there being no element of fraud the sale should not, in the circumstances, be set aside. *Held*, by Palles C.B. and Holmes L.J., O'Brien L.C. inclining to the same opinion, that a judgment against three persons may be registered by one affidavit as a judgment mortgage against the separate property of each of the judgment debtors. *Quaere*: Was the order of Barton J., referring the question to the taxing officer to determine which of the defendants should get their costs, an order which could be the subject of a valid registration as a judgment mortgage? *Woods* v. *Brown* App., 29

NATIONAL INSURANCE.
See under Insurance (National).

NEXT-OF-KIN—Power to appoint among relations—Gift in default of appointment—How far relations confined to next-of-kin - - - - - - - 42
See Power.

NUISANCE—Removal of gravel from foreshore—Injunction - - - - 210
See Sea-shore.

ORIGINATING SUMMONS — In minor matters assigned to Lord Chancellor
See Infant. [380

PERPETUITIES—Rule against—Power of appointment — Appointment void for remoteness—Election - - 315
See Settlement. 2.

PLEADING — Agreement illegal on face — Illegality not pleaded - 111, 130
See Licensing Acts.

POWER—*Will — Construction — Power of Appointment amongst Nephews and Nieces and other Relations of Donor—Power of Selection—Default of Appointment—Class to take and when to be ascertained—Vesting.*] A testator bequeathed all his property to his wife in the first place, and after her death to his "lawful nephews and nieces, meaning such nephews and nieces and other relations as she deems fit and suitable." There was no gift in default of appointment. The testator's widow by her will left part of the property to two nieces, and part to a grandnephew. The remainder of the property was unappointed. The testator's only next-of-kin were nephews and nieces, some of whom died in the lifetime of his widow. *Held*, (1) That the power of appointment was a power of selection, and not a power of distribution, and that therefore the word "relations" was not confined to next-of-kin, and that the appointment to the grandnephew was good. (2) That the class to take in default of appointment was confined to nephews and nieces and other relations, if any, who were next-of-kin; and that members of the class were to be ascertained at the death of the testator, and took vested interests then. *In re Gun*; *Sheehy* v. *Nugent* - - M.R., 42
—— Appointment void for remoteness—Election
See Settlement. 2. [315
—— To jointure — Appointment of rentcharge during life of husband - - 266
See Settlement. 1.

PRACTICE—Costs—Interlocutory order directing payment—Time from which interest runs - - - - - - 273
See Costs. 1.
—— Infant—Jurisdiction to make orders as to guardianship and maintenance on originating summons—Assignment of such summonses to Lord Chancellor. - 380
See Infant.
—— Transfer of action to County Court 259
See County Court.

PRIORITY—Lands sold under Land Purchase Acts—Charges in equal priority affecting purchase-money—Varying amounts due for arrears of interest—Deficiency of purchase-money - - - 27
See Land Purchase. 2.

PROFESSIONAL MISCONDUCT—Solicitor
See SOLICITOR. [152

PUBLIC HEALTH ACTS—Sanitary Authority —Right to monopoly of supply of water in district—Acquiescence in supply by adjoining district—Right of action 413
See LOCAL GOVERNMENT. 2.

PUBLIC POLICY—Agreement in restraint of trade—Tied house - - 111, 130
See LICENSING ACTS.

—— Injunction which would deprive troops of proper supply of water - 413
See LOCAL GOVERNMENT. 2.

QUORUM—Directors interested in subject-matter not competent to form 345, 358
See COMPANY. 1.

RELATIONS—Meaning of - - - 42
See POWER.

REMAINDER—Contingent remainder interposed between life estate and remainder in fee—Merger - - 198, 330
See MERGER.

RENT—Sale under Land Purchase Acts—Subsequent devise of real estate—Sum equivalent to one year's arrears of rent—Whether payable to devisee or to residuary legatee - - - 20
See LAND PURCHASE ACTS. 1.

RENTCHARGE—*Settlement—Grant by Settlor of Rentcharge* de novo, *to Trustee and his Heirs in trust for persons in Tail—Ultimate Remainder to Use of Settlor to attend Inheritance—Effect of barring Entail.*] A, the tenant in fee-simple of certain lands, granted a rentcharge issuable out of the lands to a trustee and his heirs upon trust for successive tenants in tail with ultimate remainder to the use of A, his heirs and assigns, to attend upon the inheritance or be disposed of as A, his heirs and assigns, should think proper. *Held*, by the Court of Appeal, affirming the decision of Wylie J., that an equitable tenant in tail in possession could, by a valid disentailing assurance, bar the subsequent limitations, and thereby acquire for himself an absolute equitable estate in fee-simple in a perpetual rentcharge. *Chaplin* v. *Chaplin*, 3 P. Wms. 229, and *Drew* v. *Barry*, I.R. 8 Eq. 260, considered. *In re Franks' Estate* - - - WYLIE J., 387; App. 395

2. —— *Will—Rentcharge created* de novo—*Disentailing Deed—Base Fee or Perpetuity—Fines and Recoveries (Ireland) Act*, 1834 (4 & 5 *Wm.* 4, *c.* 92), *ss.* 1, 12, 16.] Two tenants in tail of equitable rentcharges, which had been granted to them *de novo* without remainders over, executed a disentailing deed. *Held*, that the disentailing deed created merely a base fee in each rentcharge determinable on failure of the issue in tail. *Chaplin* v. *Chaplin*, 3 P. Wms. 229, applied. *In re Franks' Estate* [1915] 1 I.R. 387, 395, distinguished. *Pinkerton* v. *Pratt* BARTON J., 406

RENTCHARGE—*continued.*

RES JUDICATA—Test Action - 345, 358
See COMPANY. 1.

RESTRAINT OF TRADE—Tied house—Consideration - - - 111, 130
See LICENSING ACTS.

RULES AND ORDERS—Rules of the Supreme Court (1905)—Order V, Rule 2
See INFANT. [380

—— Order XLII, Rule 15 - - - 273
See COSTS. 1.

—— Order LV, Rule 3 (7), (8), (9) - 380
See INFANT.

—— Land Commission Rules, March, 1897, Order XLVI, Rule 1 - - 169
See LAND PURCHASE ACTS. 4.

—— Local Government (Procedure of Councils) Order, 1899—Article 25A. - 79
See INSURANCE (NATIONAL).

—— Solicitors' Remuneration Act, 1881—General Order, 1884, Schedule I, Part I, Rule 11
See COSTS. 2. [185

—— —— Schedule I, Part I. Schedule II 58
See COSTS. 3.

SALE—By Court—Re-opening biddings—Depreciatory conditions of sale - 29
See MORTGAGE. 2.

SANITARY AUTHORITY—Right to monopoly of supply of water in district—Acquiescence in supply by adjoining district—Right of action - - 413
See LOCAL GOVERNMENT. 2.

SEASHORE — *Removal of Gravel — Injury to neighbouring Landowner—Injunction.*] To destroy wilfully a natural barrier against the incursions of the sea so as to occasion damage to neighbouring lands is a nuisance, in respect of which there is jurisdiction to grant an injunction and damages. *Attorney-General* v. *Tomline*, 14 Ch. D. 58, followed and applied. *Hollen* v. *Tipping* [BARTON J., 210

SEPARATE CREDIT—Manager appointed by Court to carry on business of deceased—Right to indemnity out of funds carried to a separate credit — Right of trade creditors—Subrogation - - - 1
See ADMINISTRATION.

SETTLEMENT—*Construction—Power—Jointure—Voluntary Conveyance*—Ex post facto *consideration.*] Prima facie, a jointure is an estate to the wife for life to take effect on the death of the husband. *De Hoghton* v. *De Hoghton*, [1896] 2 Ch. 385, followed. L., being seised in fee of lands, by a voluntary settlement executed in May, 1879, granted the lands to trustees to the use of L. for life, with remainder to the use of trustees of a term of 500 years, upon trusts for raising portions for the younger children of the settlor, and, subject thereto, to the use of the first and other sons of L. successively in tail, with remainder to his first and other daughters in tail, with remainders over. The deed contained a power to L. to appoint to any woman he might marry, for her life or any less period, a rentcharge by way of jointure not exceeding £150 a year, charged upon all or any of the premises. By a subsequent deed, executed in August, 1879, and made in consideration of a marriage afterwards solemnized, after reciting the deed of May and the powers of jointuring therein contained, and reciting also an ante-nuptial agreement to create a rentcharge of £150 from and after the solemnization of the marriage by way of jointure during the life of the intended wife, and for that purpose to exercise the power of jointuring in the deed mentioned, L., in pursuance of the agreement, and in consideration of the intended marriage and in exercise of the aforesaid power and of every or any other power in anywise him enabling, appointed to the intended wife and her assigns, during her life, a yearly rentcharge of £150 in full for her jointure, to be charged upon the hereditaments comprised in the deed of May, 1879, payable in quarterly payments, the first payment to be made three months after the date of the solemnization of the intended marriage. *Held*, that the power contained in the settlement of May, 1879, did not authorize an appointment of a rentcharge to a wife to take effect in the lifetime of L. *Held*, also, that the settlement of May, 1879, was not, on the ground of being voluntary, void as against the settlement of August, so as to give effect to the rentcharge purported to be created by the latter settlement to commence from marriage, inasmuch as the marriage created an *ex post facto* consideration for the deed of May, and the children of the marriage were within such consideration. *Greenwood* v. *Lutman* - - BARTON J., 266

2.——*Power—Appointment void for Remoteness—Election.*] By a marriage settlement certain trust funds were settled upon trust for the husband and wife successively for life, and after their deaths for such of the issue of the marriage, whether children or remoter issue, at such time and in such shares as the husband and wife should jointly appoint, and in default as the survivor

SETTLEMENT—*continued.*

should appoint, and in default for all the children of the marriage who should attain twenty-one, or marry, in equal shares. The husband, who survived his wife, by his will, reciting his power of appointment under the settlement, and that no appointment had been made thereunder, bequeathed both the property subject to the trusts of the settlement and other property of his own to trustees upon trust to pay the income to his daughter for her life without power of anticipation, and after her death he directed his trustees to hold both capital and income in trust for the children of his daughter as she should appoint, and in default of appointment for all her children equally, and he directed that his daughter should, within such time after his decease as his trustees and executors might think proper to appoint, elect in writing whether she would rely on her rights under the marriage settlement or take the benefits provided for her by his will, and in the event of her not electing to take the benefits provided for her by his will, he directed his trustees to hold the property upon certain trusts for the benefit of his son for life, and after his decease for his children. The daughter elected to take under the will. *Held*, that inasmuch as, reading the provisions of the will into the settlement, the restraint on anticipation of the income of the settled fund appointed to the testator's daughter, and the trusts in favour of her children, infringed the rule against perpetuities, she was not bound to elect, and was not bound by the election made by her, and that she was entitled to an estate for her life in the whole fund settled by the settlement, free from the restraint on anticipation, and that on her death it went as in default of appointment between her and her brother, in equal shares. *In re McCormick*, *Hazlewood* v. *Foot* - - - M. R. 315

3.—— *Real Estate — Limitations — Equitable Estates in Fee—No Words of Inheritance—Estate for Life or in Fee-Simple—Intention.* A limitation, in a deed, of an equitable estate without words of limitation, may confer the equitable fee where the intention to do so appears from the deed. By deed, reciting that C. had agreed, in consideration of B. paying off certain debts of C., to convey certain lands, held in fee-farm, to a trustee in trust for B. and his wife during their lives, with remainder to C. and his wife during their lives, with remainder, subject to a sum of £600 charged in favour of the eldest son of C. and his issue, in trust for the children of C. and his wife as he should appoint, and, in default of appointment, for all the children save the eldest son, C. conveyed the lands unto and to the use of a trustee and his heirs upon the trusts so agreed upon, the ultimate trust being for the children of C. as he, or in default his wife,

SETTLEMENT—*continued.*
should appoint, and in default of such appointment "then to such issue save the eldest son, share and share alike." The lands were not of very great value. *Held*, that there was sufficient evidence on the face of the instrument to show that it was the intention of the settlor to dispose of his whole estate, and that the younger children, notwithstanding the absence of words of inheritance in the limitation to them in default of appointment, took an equitable estate in fee-simple, as tenants in common in equal shares, in the lands. *In re Tringham Trusts, Tringham* v. *Greenhill*, [1904] 2 Ch. 487; *In re Houston, Rogers* v. *Houston*, [1909] 1 I. R. 319; and *In re Stinson's Estate*, [1910] 1 I. R. 47, followed. *Meyler* v. *Meyler*, 11 L. R. Ir. 522, and *Bennett's Estate*, [1898] 1 I. R. 185, not followed. *In re Cross's Trusts, Cross* v. *Cross* [M. R., 304

——Rentcharge created *de novo* in tail—Effect of barring entail - - 387, 395, 406
See RENTCHARGE. 1, 2.

——Will—Bonus on settled shares—Dividend paid out of accumulated profits—Capital or income - - - - - 321
See TENANT FOR LIFE AND REMAINDERMAN.

SHAREHOLDER—Right of action against director - - - - 237, 249
See COMPANY. 2.

SHARES—Bonus—Dividend paid out of accumulated profits—Capital or income 321
See TENANT FOR LIFE AND REMAINDERMAN.

SICKNESS BENEFITS—National Insurance—Employment under Local Authority 79
See INSURANCE (NATIONAL).

SOLICITOR — *Professional Misconduct — Using Testimonials from Judges to obtain Business—Committee of Council of Incorporated Law Society—Nature of Proceedings before, on Charge of Professional Misconduct—Destruction of Material Documents—Contempt of Court—Solicitors (Ireland) Act*, 1898 (61 & 62 *Vict.* c. 17), ss. 34, 35. It appeared from a report of the committee, appointed under the Solicitors (Ireland) Act, 1898, of the council of the Incorporated Law Society, that A, a solicitor practising in Dublin and Belfast, with a view to obtaining business from an insurance company, some of which business would in all probability take place in the courts of the Recorder of Dublin and Belfast, wrote to the manager of the company, enclosing copies of testimonials from the Recorders of those cities testifying to A's professional ability. These testimonials had been obtained by A for the purpose of an application by him for an appointment. The testimonial from the Recorder of Dublin contained the statement,

SOLICITOR—*continued.*
"He [A] now practises before me regularly." In the testimonial from the Recorder of Belfast, it was stated that A had acted as his registrar for a number of years, and had resigned to his regret, and that he continued to act as his solicitor. *Held*, that the use by A of these testimonials for the purpose of obtaining business, which business might lead him to practise before the Recorders of Dublin and Belfast, amounted to professional misconduct. After an application had been made to the committee appointed under sect. 34 of the Solicitors (Ireland) Act, 1898, of the Council of the Incorporated Law Society, to hear a charge of misconduct against a solicitor, and before the report of the committee had been presented to the Lord Chancellor, the solicitor destroyed the documents on which the charge of misconduct was founded. *Semble*, this amounted to a contempt of Court. The nature of proceedings before such committee considered. *In re A Solicitor* [LORD CHANCELLOR, 152

—— Costs — Taxation — Scale fee — Sale under Lands Clauses Acts—Costs of purchaser's solicitor - - - - - - 185
See COSTS. 2.

—— Costs — Scale fee — Same solicitor acting for vendor and purchaser - - 58
See COSTS. 3.

SPECIFIC PERFORMANCE—Agreement to grant right of way — Jurisdiction of county court - - - - 259
See COUNTY COURT.

STATUTE—Statutory duty—Statute providing for making of regulations giving rights to a class — No regulations made—right of action - - - - - 216
See LOCAL GOVERNMENT. 1.

STATUTES—
4 Geo. 4, c. 33, s. 17—County Treasurers 276
See MORTGAGE. 1.
3 & 4 Wm. 4, c. 37, s. 7—Real Property Limitation - - - - - - 296
See LIMITATIONS, STATUTE OF.
4 & 5 Wm. 4, c. 92, ss. 1, 12, 16 — Fines and Recoveries - - 387, 395, 406
See RENTCHARGE. 1, 2.
7 & 8 Vict. c. 97, s. 16 — Charitable Donations and Bequests - - - - 191
See WILL. 1.
13 & 14 Vict. c. 29, s. 6—Judgment Mortgage
See MORTGAGE. 1, 2. [29, 276
30 & 31 Vict. c. 48—Sale of Land by Auction
See MORTGAGE. 2. [29
37 & 38 Vict. c. 57, ss. 8, 10 — Real Property Limitation - - - - - 285
See LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891.

STATUTES—*continued.*
40 & 41 Vict. c. 56, s. 33 (d), s. 36 — County Officers and Courts - - - 259
See COUNTY COURT.
41 & 42 Vict. c. 52, ss. 61, 71 — Public Health
See LOCAL GOVERNMENT. 2. [413
40 & 41 Vict. c. 57, s. 28, sub-s. 2—Judicature (Ireland) - - - - - 285
See LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891.
44 & 45 Vict. c. 41, s. 70 — Conveyancing and Law of Property - - - 29
See MORTGAGE. 2.
—— —— c. 44 — Solicitors' Remuneration
See COSTS. 1, 2. [58, 185
—— —— c. 49, s. 50 — Land Law (Ireland)
See LAND PURCHASE ACTS. 4. [169
51 & 52 Vict. c. 59, s. 8—Trustees - 285
See LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891.
54 & 55 Vict. c. 66, s. 29 — Local Registration of Title - - - - - - 285
See LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891.
59 & 60 Vict. c. 55, s. 2—Public Health 413
See LOCAL GOVERNMENT. 2.
61 & 62 Vict. c. 17, ss. 34, 35 — Solicitors (Ireland) - - - - - 152
See SOLICITOR.
—— —— c. 37, s. 83, sub-s. 11; s. 109—Local Government . - - - - 79
See INSURANCE (NATIONAL).
3 Edw. 7, c. 37, s. 24, sub-s. 8—Irish Land 20
See LAND PURCHASE ACTS. 1.
—— —— s. 48 - - - - - 213
See WILL. 7.
6 Edw. 7, c. 7, s. 29—Labourers - 216
See LOCAL GOVERNMENT. 1.
9 Edw. 7, c. 42, Part IV—Irish Land - 169
See LAND PURCHASE ACTS. 4.
—— —— s. 63 (2)—Irish Land - - 422
See LAND PURCHASE ACTS. 3.
1 & 2 Geo. 5, c. 55, s. 8 (1) (c) (d) Sch. I, Part II (b)—National Insurance 79
See INSURANCE (NATIONAL).

SUBROGATION—Manager appointed by Court to carry on business of deceased — Right to indemnity out of general assets in respect of trade debts—Right of creditors—Subrogation — Effect of carrying fund to separate credit - - - 1
See ADMINISTRATION.

SUPERANNUATION — Of officers — Local Government (Ireland) Act, 1898 79
See INSURANCE (NATIONAL).

TENANCY AT WILL—Implication of—Determination of—Statute of Limitations
See LIMITATIONS, STATUTE OF. [296

TENANT FOR LIFE AND REMAINDERMAN—*Will—Settlement—Bonus on Settled Shares—Dividend paid out of accumulated Profits—Capital or Income.* A testator, by his will, settled shares in an American Railway Company. Some years after the testator's death the Company, which had obtained the necessary powers to increase its capital, paid a bonus of 50 per cent. to its stockholders out of accumulated profits, the payment being made in the form of a 40 per cent. dividend payable in stock, and a 10 per cent cash dividend. *Held*, that the trustees of the will should deal with the 40 per cent. stock dividend as an accretion to the capital of the testator's estate, and with the 10 per cent. cash dividend as income arising from the estate. *In re Carson*; *Carson* v. *Carson* [M.R., 321

TENANT IN TAIL.
See ESTATE TAIL.

TEST ACTION—What necessary to constitute.
See COMPANY. 1. [345, 358

TIED HOUSE - - - 111, 130
See LICENSING ACTS.

TRADE—Agreement in restraint of—Tied house—Consideration - - 111, 130
See LICENSING ACTS.

TRANSFER—Of action to County Court—Action for specific performance of agreement to grant right of way - 259
See COUNTY COURT.

TROOPS—Supply of water to—Injunction which would prevent - - - 413
See LOCAL GOVERNMENT. 2.

TRUST—Express—Legacy charged on land—Statute of Limitations - - 285
See LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891.

ULTRA VIRES—Agreement that director of company need not account for moneys received—Right of action by shareholder - - - - 237, 249
See COMPANY. 2.

VENDOR AND PURCHASER—Conditions of sale—Sale by Court—Depreciatory conditions—Re-opening biddings
See MORTGAGE. 2. [29
—— Costs—Sale under Lands Clauses Acts—Scale fee - - - - 185
See COSTS. 2.
—— Costs—Scale fee—Same solicitor acting for vendor and purchaser - - 58
See COSTS. 3.

VOLUNTARY SETTLEMENT—Subsequent marriage—*Ex post facto* consideration
See SETTLEMENT. 1. [266

WATER—Right of Sanitary Authority to monopoly of supply of, in district—Acquiescence in supply by adjoining district—Right of action — Injunction — Effect to deprive troops of proper supply of water 413
See LOCAL GOVERNMENT. 2.

WAY—Agreement to grant right of way—Suit for specific performance—Jurisdiction of County Court - - - - 259
See COUNTY COURT.

WILL—*Charitable Bequest payable out of the Proceeds of the Sale of Land—Charities not administered in Ireland—Death of Testator within three months—Failure of Gift—Charitable Donations and Bequests (Ireland) Act*, 1844 (7 & 8 *Vict. c.* 97), *s.* 16—*Construction—Gift of Income—Absolute Gift.* A testator by his will directed that all his property should be sold by his executors, and directed them, after payment of certain legacies, to invest the residue of the proceeds, and pay the interest on the same to his wife, so long as she should remain single and unmarried, but in case she should marry again, he directed that she should then only receive the interest on half the amount so invested. The will provided that the testator's wife at her death should have power to dispose of half of the money so invested, as she should think fit, and that the balance of the other half, after payment of certain legacies, should be divided equally amongst the Presbyterian Orphan Society, the Presbyterian Jewish Mission, the Presbyterian Foreign Mission, and the Presbyterian Colonial Mission. The testator died within three months of the execution of the will; his widow died intestate without ever having married again. *Held*—(1) That the words "in Ireland" in section 16 of 7 & 8 Vict. c. 97, are to be read in connexion with the words "no donation, devise, or bequest," and not with the words "pious or charitable uses," and that therefore the gifts to the charities failed so far as they were payable out of the proceeds of the sale of land. *In re Knox, Deceased*; *Snodgrass* v. *Gamble*, [1910] 1 I. R. 20; and *Boyle* v. *Boyle*, I. R. 11 Eq. 433, followed. *Brown* v. *Harrison*, 35 I. L. T. R. 25, not followed. (2) That as regards the lapsed portion of the residue there was not, on the true construction of the will, an absolute gift to the testator's wife in the first instance, and that therefore on her death it passed to the next-of-kin of the testator as undisposed of. *In re Orr*; *M'Dermott* v. *Anderson*. [M.R., 191

2. —— *Construction—Absolute Interest or Life Estate — Gift for Life with Power of Disposition superadded.* A testator bequeathed to his sister M. the sum of £2000 for her life, and at her death to be disposed of as she so wished. M. died without making any disposition of the £2000.

WILL—*continued.*

Held, that M. took a life interest only, with a power of appointment. *In re Burkitt*; *Hancock* v. *Studdert*. [M.R., 205

3. —— *Construction—Absolute Gift—Restriction — Legatee to receive a Sum monthly with Power to dispose by Will of any Portion remaining.* A testatrix by her will provided as follows:—"I will and bequeath to my brother J. my household furniture and the money in bank which I am entitled to under the will of my brother T., to be given to him at the rate of £2 per month during his life, and should any portion be remaining at his death he to have power to dispose of it by will." There was no gift over. *Held*, that J. took an absolute interest, and was entitled to payment of a sum in bank of £317, which represented assets of the testatrix received by her under the will of her brother T. *In re M'Carten*; *M'Kenna* v. *M'Carten* [BARTON J., 282

4. —— *Construction — Acceleration — Gift of Income of Fund to Widow until Re-marriage—Gift of the Fund on her Death—Re-marriage of Widow.* A testator directed his executors to pay to his wife the income of a fund of £1000 so long as she remained unmarried, and, on her re-marriage to pay her £300 out of the fund. On the widow's death, he directed "the money funded for her use" to be divided among the eldest sons of the testator's brothers and sisters "then living," and mentioned in the will. The widow re-married. *Held*, that, upon the determination of the widow's interest in the fund by her re-marriage, there was an acceleration of the subsequent interests, and also an acceleration of the time of ascertainment of the class of donees. *In re Johnson*, 68 L. T. 20, applied. *In re Crothers' Trusts.*

[BARTON J., 53

5. ——*Construction—Annuity—Direction to pay out of Rents and Profits—Charge on Corpus.* A testator by his will devised and bequeathed to trustees certain houses, upon trust to receive the rents and profits thereof, and to pay thereout the head-rent and other outgoings, and as to the residue of the rents and profits after payment of the above, upon trust to pay a number of annuities to certain persons for their lives, and after their deaths to hold the annuities on trust for testator's son R., and after payment of such annuities, to pay out of the residue of such rents and profits as the same should come to their hands a certain debt due by the testator. All the residue of his real and personal estate he devised and bequeathed to his son R. The rents and profits were insufficient to pay the annuities in full. *Held*, by the Court of Appeal (affirming the decision of the Master of the Rolls), that the annuities were a charge on the

WILL—*continued.*

corpus. *Phillips* v. *Gutteridge*, 3 De G. J. & S. 332, applied and followed. *In re Buchanan; Stephens* v. *Draper*. M.R., 95; APP. 99

6.——*Construction—Gift of Chattels Real—Gift over on Death without Heirs to person capable of being Heir—"Heirs" not read as "Heirs of the Body."* A testator left a chattel farm to his son John, and directed that if he should die "without lawful aires" the farm should go to testator's son Thomas or his "airs," he paying certain sums to John's widow and his brothers and sisters. John died without issue. *Held*, that the context showed that the words "without lawful aires," meant without next-of-kin being children or descendants, and that the gift over to Thomas took effect. *Kirkpatrick* v. *King*, 32 I.L.T.R. 41, distinguished. *Gray* v. *Gray*. - - - BARTON J., 261

7.—— *Construction—Gift of Residue in Equal Shares to Named Persons surviving Tenant for Life—Effect of Revocation of Shares of one or more—Gift to a Class.* A testator bequeathed the residue of his property to trustees upon trust for his sister for life, and upon her death in trust for five persons or such of them as should be alive at the death of the survivor of his sister and himself, in equal shares. By a codicil the testator revoked the gift to two of the five legatees. All five survived the testator and his sister. *Held*, by the Court of Appeal, affirming the decision of the Master of the Rolls, that the effect of the revocation was to augment the shares of the other legatees. *In re Donaldson; Watson* v. *Donaldson*. [M.R., 63; APP. 70.

8.—— *Construction — Land Purchase Acts — Bonus—Gift of Proceeds of Sale of Lands being sold to Tenants — Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 48. The percentage or bonus payable under sect. 48 of the Irish Land Act, 1903, is a personal thing given as an inducement to an owner to sell lands. It is not an interest in the lands sold, nor is it part of the proceeds of sale of the lands, and therefore does not pass under a gift in a will of "my property . . . being sold to the tenants under the Land Law (Ireland) Act, 1903, and the proceeds thereof when

WILL—*continued.*

sold." View of Eve J. in *Tremayne* v. *Rashleigh*, [1908] 1 Ch. 681, that the bonus is an interest in the lands, dissented from. *Heard* v. *Gabbett*. [ROSS J., 213

—— Arrears of Rent—Sale under Land Purchase Acts—Subsequent devise of real estate—Sum equivalent to one year's arrears of rent—Whether payable to devisee or to residuary legatee - - - - 20
See LAND PURCHASE ACTS. 1.

—— Exercise of power of appointment—Appointment void for remoteness—Election 315
See SETTLEMENT. 2.

—— Power of appointment among testator's nephews and nieces, meaning such nephews and nieces and other relations as donee of power deems fit—Power of selection — Class within power — Class entitled in default of appointment — When class to be ascertained—Vesting
See POWER. [43

—— Rentcharge created *de novo* in tail—Effect of barring entail - - - - 406
See RENTCHARGE. 2.

—— Tenant for life and remainderman—Bonus on shares—Dividend paid out of accumulated profits—Capital or income 321
See TENANT FOR LIFE AND REMAINDERMAN.

WORDS—"Nephews and nieces, meaning such nephews and nieces and other relations as [A] deems fit" - - - - 42
See POWER.

—— "Officer" - - - - - - 79
See INSURANCE (NATIONAL).

—— "Then living" - - - - - 53
See WILL. 4.

—— "Without lawful 'aires'" - - 261
See WILL. 6.

WORDS OF INHERITANCE—Absence of, in Deed—Intention — Equitable estate in fee - - - - - - - 304
See SETTLEMENT. 3.

THE END.

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